No. 15669

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY JOSEPH,

Appellant,

vs.

HANOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN and M. H. WYMAN,

Appellees.

APPELLANT'S OPENING BRIEF.

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HARRY JOSEPH,

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vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL: RALEIGH CHINN: KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER: E. W. STUCHELL: D. E. WYMAN and M. H. WYMAN,

Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal by plaintiff from a judgment of dismissal of plaintiff's cause of action pursuant to the trial court's granting of a motion to dismiss under Rule 41(b), Federal Rules of Civil Procedure [Tr. 283-284]. Plaintiff's cause of action was for imposition of a trust upon one-half of the stock of Kinzua Lumber Company [Tr. 3-9].

Jurisdiction.

This is an action based upon diversity of citizenship of the parties and the matter in controversy exceeding, exclusive of interest and costs, the sum of $3,000 [Pre-trial Order, 153-154].

Jurisdiction is conferred on the trial court by 28 U. S. C. 1332. Jurisdiction is conferred on this court by 28 U. S. C. 1291.

Judgment herein was rendered and filed on June 3, 1957 [Tr. 283-284]. Notice of Appeal was filed by plaintiff on June 27, 1957 [Tr. 285].

Statement of Points.

The statement of points on which plaintiff intends to rely on this appeal is as set out in plaintiff's original statement [Tr. 287-288]:

1. The Court erred in entering its judgment and conclusions of law for defendants, when such judgment and conclusions were unwarranted and unsupported by the findings of fact.

2. The Court erred in making the findings of fact which it rendered, in that such findings of fact were contrary to the evidence and clearly erroneous, the evidence establishing the existence of a joint venture, its non-termination, the taking from him of plaintiff's right to a half participation in the Kinzua purchase and operation, and plaintiff's right to relief.

3. The Court erred in failing to hold that the evidence established the existence of a joint venture in the Kinzua purchase and operation, the taking from plaintiff of his right to a half participation therein, and plaintiff's right to relief, and in failing to hold plaintiff entitled to one-half of the Kinzua deal upon appropriate payment, and in failing to proceed to the taking of evidence to determine and adjudge plaintiff's precise entitlements and participations.

4. The Court erred in dismissing plaintiff's action against all defendants, or any of them.

5. The Court erred in granting the motion of defendants to dismiss the action on the ground that plaintiff

had shown no right to relief on the facts and the law, or on any ground.

6. The Court erred in limiting discovery procedures by plaintiff narrowly to the single issue of the liability of defendant O'Donnell.

Statement of the Case.

Plaintiff Harry Joseph brought this action in the District Court of the United States, Western District of Washington, Southern Division, to impose a constructive trust on, and obtain an accounting with regard to, 50% of the capital stock of Kinzua Lumber Company, a corporation which directly or indirectly owned valuable timberlands, lumber mills and other valuable properties in Oregon [Complaint, Tr. 4-8].

The defendants were Harry O'Donnell, a Seattle businessman [Complaint, Tr. 3]; Donover Company, a corporation controlled by defendant O'Donnell [Complaint Tr. 5]; Alvin Schwager, E. W. Stuchell, D. E. Wyman, M. H. Wyman, Bryant R. Dunn and Raleigh Chinn, all purchasers of Kinzua stock [O'Donnell Answer, Tr. 68], and friends of O'Donnell; Capital Timber Company, a corporation (which purchased 50% of the Kinzua stock) [Capital Timber Company Answer, Tr. 44], and its Trustees in Dissolution, Mark F. Mathewson and Richard K. Bush; and Kinzua Corporation.

Plaintiff charged in his complaint that he had discovered and obtained information concerning the purchase of Kinzua Lumber Company and decided to invest to the extent of 50% himself [Complaint, Tr. 5].

Plaintiff sought an experienced timber operator in the Pacific Northwest as purchaser of the other 50%, and to this end approached defendant Raleigh Chinn, whom he relied upon [Complaint, Tr. 5].

Chinn referred plaintiff to Harry J. O'Donnell, as "just the man." [Complaint, Tr. 5.] O'Donnell agreed with plaintiff to buy Kinzua equally, together with the associates of O'Donnell and Joseph [Tr. 165], if Joseph and O'Donnell were satisfied the stock should be bought.

However, plaintiff alleged, defendant O'Donnell in violation of his trust, and acting for the other defendants, bought Kinzua for himself and them without advising plaintiff of this [Complaint, Tr. 7], and while Joseph, lulled by representations of O'Donnell, relied on such representations and hence did not himself negotiate for the Kinzua purchase [Complaint, Tr. 6-7].

All the shares of Kinzua Lumber Company were purchased by defendants for the total purchase price of $12,250,000, of which $3,343,000 was paid in cash [Tr. 202]. The shares went as indicated in this table, taken from O'Donnell's Answer [Tr. 68]:

Purchaser	Shares of Capital Stock Purchased
Harry J. O'Donnell	837.2
E. W. Stuchell	1,196
Max H. Wyman	1,554.8
David E. Wyman	1,554.8
Raleigh Chinn	119.6
Alvin Schwager	239.2
Bryant R. Dunn	119.6
Capital Timber Products Company	5,980
Donover Company, Inc.	358.8

The Capital Timber Products Company was the company of Howard Webster, a Canadian financier who agreed with O'Donnell to take 50% of the Kinzua stock [Findings, Tr. 267].

In answering, defendants were represented by four legal firms.

Six separate answers appear at pages 33-115 of the transcript. These answers generally deny the existence of a joint venture and assert whatever relationship there may have been did not constitute a contract [O'Donnell's Statement of Issues, Tr. 221]; they deny the existence of a fiduciary relationship [Tr. 222], and they deny any breach by O'Donnell [Tr. 222]. They further assert that any relationship that may have existed was terminated and abandoned by Joseph [Tr. 222], and that plaintiff's claim is barred by laches [Tr. 234].

Capital Timber Products Company and its trustees in dissolution also filed a cross-claim against O'Donnell, charging that O'Donnell never told them of plaintiff or of the relationship between plaintiff and O'Donnell which plaintiff asserts [Tr. 44]. The cross-claim asserts that if plaintiff prevails, O'Donnell's representations that the 50% of Kinzua was available for purchase would be false, and known to O'Donnell to be false [Tr. 45]; and that should plaintiff establish a denied agency or joint venture relationship between O'Donnell and Capital Timber Products Company, O'Donnell's failure to disclose would constitute a breach and violation of fiduciary duty by O'Donnell [Tr. 45]. In such event, the cross-claim asks recovery against O'Donnell for damages and judgments against Capital thus incurred [Tr. 45-46].

The trial court ordered separate trial of issues in the following order:

(a) Plaintiff's right to relief, if any, against the defendant Harry J. O'Donnell;

(b) Plaintiff's right to relief, if any, against the other defendants, or any of them;

(c) The remedial relief, if any, to be afforded to plaintiff, including the imposition of a constructive trust upon the shares of Kinzua Lumber Company capital stock, the tracing of assets of Kinzua Lumber Company, and the

accounting for profits and accretions, and such other relief as plaintiff seeks;

(d) The right of cross-claiming defendants to relief upon their cross-claim against the defendant O'Donnell.

The trial court limited the scope of discovery examinations and proceedings to matters relevant to the subject matter of the issue next to be tried [Tr. 228-229].

Trial was held, limited only to the issue of O'Donnell's liability to plaintiff, before Honorable George H. Boldt, commencing September 24, 1956 [Tr. 306], and continuing until November 27, 1956 [Tr. 2000], with various interruptions.

In addition to plaintiff and his witnesses, extensive examination was made of adverse witnesses Chinn, O'Donnell and Dunn, among others. O'Donnell was concededly the leader of the Seattle group who acquired among them 50% of the Kinzua shares.

Defendants, prior to the close of plaintiff's case, also put on, out of order, two witnesses: Dr. Thomas Holmes and Honorable William J. Lindberg, United States District Judge.

Numerous and extensive depositions, both of persons who testified at the trial and of those who did not, were introduced into evidence.

At the close of plaintiff's case, defendants moved for dismissal under F. R. C. P. Rule 41(b) [Tr. 2035-2037]. The trial court stated that ". . . most, if not all, of the adverse parties have been interrogated at very great length and in great detail concerning the transactions in question, and, accordingly, the evidence of all the principals almost without exception, is before me." [Tr. 2037.]

Following oral argument, the court on January 18, 1957 granted the motion in an oral decision [Tr. 4246, *et seq.*], followed by Findings of Fact and Conclusions

of Law of June 3, 1957 [Tr. 244], and Judgment, also of June 3, 1957 [Tr. 283].

This appeal followed in due course, based in large measure on the insufficiency of the facts to support the findings, and of the findings to support the judgment that there was no joint venture or that it was terminated, or that plaintiff was barred by laches. These findings, and the judgment based thereon, are urged to be clearly erroneous as contradicting the evidence, including many admissions of the defendants themselves.

Brief Summary of Argument.

Plaintiff in this suit in equity urged the creation and existence of a joint venture agreement between plaintiff and Harry O'Donnell and his group with respect to the joint purchase of the valuable Kinzua Lumber Company. Judgment was for defendant following the granting of a motion for dismissal at the close of plaintiff's case under F. R. P. C. Rule 41(b).

Plaintiff and appellant urges on this appeal that the conclusions of law and judgment are unsupported by the findings of fact; that the findings of fact are unsupported by the facts and clearly erroneous; that the trial court should have denied the motion and held instead that the evidence, particularly documents and the admissions of defendants plainly established the existence and enforceability of the joint venture agreement.

We point out that under the cases the startling admissions, the powerful documentary evidence, and the incredible and self-contradictory testimony of defendants, many of whom have testified extensively as adverse witnesses, together with certain of the findings themselves, place this court under the authorities in a position wherein reversal for the clearly erroneous character of vital findings is plainly indicated.

Dividing the argument of the complex factual situation into manageable categories, we first set out our summary of our own position as to the facts. Next, we indicate the grossly erroneous character of the findings purporting to deny the existence of the joint agreement, which we submit is virtually admitted by the testimony, and is admitted over and over again by the admitted actions of the defendants themselves, and buttressed even by some of the factual findings themselves.

A section on the total lack of credibility of defendants O'Donnell and Chinn is included. Here we set forth characteristic examples of the remarkable compelled admissions, sly evasions, self-contradictions and contradictions of incontrovertible documents, which constitute the warp and woof of the testimony of O'Donnell.

In other sections we show that the conduct of O'Donnell, despite contrary assertions and conclusionary findings, was always—until the time of betrayal and exclusion of Joseph —such as necessarily to imply, support and acknowledge the existence of the joint venture agreement with Joseph, and that Joseph's conduct implied, buttressed and was in strict accord with the joint venture agreement and any obligations thereunder.

We also show that O'Donnell, despite contrary conclusionary findings, never intended to drop or dropped the Kinzua deal.

The total inapplicability of laches, speculative delay, and estoppel is next shown; Joseph neither sought nor received gain from delay, nor actually delayed in efforts to bring O'Donnell and his group to justice. Nor did O'Donnell or his group ever genuinely lose anything whatever from whatever passage of time transpired between their gross breach and commencement of suit.

Finally, the applicability of the law of joint venture and of fiduciary obligation to the shabby betrayals by O'Donnell of Joseph is briefly shown.

ARGUMENT.

I.

Here Plaintiff States His Case—That Plaintiff, Learning of and Having Access to a Unique and Valuable Opportunity to Acquire an Enormously Valuable Timber Empire on Extremely Favorable Terms and Entering With Defendant O'Donnell Into a Joint Venture to Purchase the Same Equally, Was Pushed Out of His Own Deal by O'Donnell, a Fiduciary Who Sought to Purchase for Himself and Those of His Choosing, in Violation of His Trust, and Must Now Be Held to Account.

This appeal necessarily involves a long and complex analysis of evidence, even though it will be boiled down as far as may be. This preliminary discussion then, is, without any citations or apology for their absence, simply a recounting of plaintiff and appellant's general position as to the significance of the lengthy evidence on this appeal. In later portions of this brief, citations to the record will be carefully made, of course; this section is simply a summary of what we believe the facts show by the record are.

(a) Admissions and Undenied and Documentary Evidence Establish This Case.

Defendants in this cause are condemned from their own mouths. Plaintiff urges that the admissions of defendants alone virtually require judgment for plaintiff as an equal joint venturer in the purchase of a vast lumber company, cunningly pushed out of his own deal by O'Donnell.

Admittedly, Chinn and O'Donnell learned first of the availability of the Kinzua Lumber Company for purchase from plaintiff and his broker Sam Terman, and from them alone.

Admittedly, plaintiff arranged for Chinn, O'Donnell and himself the Portland meeting on November 19, 1952, with Coleman, representative of the sellers of Kinzua. Admittedly, immediately after this meeting O'Donnell's lawyer Dunn framed the acquisition plan and O'Donnell conferred with bankers about financing of the purchase.

Without denial by Chinn and O'Donnell, Harry Joseph testified that at the time of the Portland meeting, Joseph and O'Donnell agreed that Joseph and his group would take a 50% interest, and O'Donnell and his group would take a 50% interest, in the purchase of the Kinzua Lumber Company. O'Donnell and Chinn admitted being with Joseph at the time of the conversations, but said they could not recall the conversations.

Admittedly, O'Donnell kept in contact with Joseph over a period of months and give him information about newly discovered facts as to Kinzua and the method of acquisition.

Admittedly, O'Donnell and his Seattle group could not finance the entire purchase, and admittedly Joseph was to raise what he could in the East; then the Joseph and O'Donnell groups, admittedly, were to sit down and allocate. Admittedly, O'Donnell had no more right to perform this allocation than Joseph.

Undeniedly, Joseph worked in Chicago to secure, and did secure, qualified, responsible and fully adequate investors, then and now committed to put up monies adequately taking care of the Joseph's group 50% of the deal.

Admittedly, Joseph, in March 1953, was called by O'Donnell and told that the matter would need to be further looked over. Admittedly, it was weeks after that that the financial statements of the seller were obtained; and further months until the essential cruise, or inspection, of the timber was obtained. Admittedly, O'Donnell, a few weeks after seeing the balance sheets, went out

and got another investor for Joseph's 50% of the deal. Admittedly, he never contacted Joseph thereafter, or tell him of the favorable balance sheets or timber reports, until the deal was concluded with the other investor, and was pointedly asked for explanation by Joseph.

Admittedly, O'Donnell wrote a letter of explanation which has many untruths therein. The letter attempts to make the deal with the other investor look like a casual happenstance, instead of the earnestly pursued endeavor which it admittedly was.

We say that, on the state of the record, with this and many other admissions, the necessity of judgment for plaintiff is clear. O'Donnell can do no more than assert, weakly, that he thought Joseph wanted out of the deal because another investor, A. C. Allyn, assertedly wanted out; but he admits Joseph never told him he would be out if Allyn were out, and that he never got back to Joseph about the Allyn delay.

Here is no evidence of abandonment; yet outside of this O'Donnell and the co-defendants, pressed to it by searching examination and documentary evidence, have had to give away every essential element of their defense from their own mouths.

(b) A More General View of the Evidence.

Harry Joseph, a Chicago businessman of absolutely unquestioned integrity and means, learned from a California real estate agent and friend, Sam E. Terman, of the existence of a wonderful opportunity for purchase of Kinzua Lumber Company, a vast timber empire in the Pacific Northwest. Joseph, eager to enter on the purchase of this great enterprise, contacted a long-time friend and acquaintance of his, one Raleigh Chinn, whom he knew and had done business with over a period of many years, and asked Chinn whether he knew of someone who

had both the experience and the means to enter into such a deal with him.

Chinn suggested Harry O'Donnell, a Seattle lumberman of education, wealth and experience, whom Chinn knew very well.

Thereafter, Chinn, O'Donnell and Terman met in Los Angeles on November 6, 1952. On or about this same date, as the result of Terman's prodding of Gold & Needleman, Joseph Coleman, President of Kinzua, called Joseph and discussed the availability of the Kinzua stock at a price of $12,000,000. Joseph and Coleman agreed on a meeting, to be held in Portland, Oregon, at the Heathman Hotel on November 19, 1952. Joseph called Chinn and advised him of the date and place of the meeting. Chinn agreed to meet Joseph in Portland on the night of November 18th, and to bring O'Donnell with him.

They joined him at the Old Heathman Hotel in Portland on November 18, 1952, the day before the meeting. They spent the entire late afternoon and a long evening together, and of course discussed earnestly their relationship in the venture upon which they had come to embark—the purchase of the multi-million dollar Kinzua lumber empire.

They agreed specifically and affirmatively that Joseph and O'Donnell, for themselves and groups headed by each of them in Chicago and Seattle respectively, should, as equal joint venturers negotiate for and consummate the purchase of Kinzua on whatever suitable purchase basis could be arranged. Joseph specifically made it clear to O'Donnell that he, Joseph, regarded himself as both morally and legally bound to pay to Terman a commission of 5% on the transaction as and when the purchase was made. O'Donnell expressed the view this was quite expensive and asked whether Terman wanted it all in cash.

Joseph gave it as his view that Terman might be willing to take all or some part of his commission in terms of stock or other participation in the deal. O'Donnell was equivocal as to payment of the commission.

On November 19, 1952, O'Donnell, Chinn and Joseph had a lengthy discussion with Coleman and his attorney, Casey. During this discussion, the character and extent of the properties were outlined in considerable detail. At the conclusion of the conference with Coleman and Casey, O'Donnell stated to Chinn and Joseph that if Coleman's representations as to the quantity and quality of the timber were true, the properties would be worth the asking price.

While it is not certain, it is quite likely that Joseph's loyalty to his duty to Terman was a main reason impelling O'Donnell to his desire to shake out Joseph as the provider of the other 50% of the financing. What *is* certain is that later actions by O'Donnell were carefully calculated to prevent, and did prevent, Joseph from remaining part of the very deal which he initiated; he was entirely shut out of it, and read of its consummation only in the newspapers.

O'Donnell, by patient maneuverings over a period of months, arranged a deal wherein Joseph was euchered out of his share of the deal.

Almost immediately upon the return of Chinn and O'Donnell from Portland, O'Donnell, who admittedly led and headed the actions of the Western or Seattle group at all times, swung into action—which never thereafter ceased, despite any assertions or pretenses to the contrary.

In the month of November, Harry Joseph met in the offices of Gold & Needleman with Coleman, Gold, Needleman and Terman present, and put in a call to O'Donnell in Seattle, in which it was agreed that O'Donnell would

contact Coleman for an inspection of the Kinzua properties. Such an inspection was made, limited by snow, of a portion of the properties.

O'Donnell held conferences with Western bankers concerning the possible financing of the operation; he conferred with other defendants concerning financing of the Seattle group's half of the deal. He went to work with his accountant and his attorney, Bryant Dunn, another defendant, to work out the basis on which the property could most advantageously be acquired. Dunn did so work out the basis, as early as December of 1952. It involved generally acquisition of Kinzua stock by the buyers, dissolution of Kinzua, distribution of its assets, and taking of a capital gain on the new basis by disposition of the assets. This is the plan which was in fact ultimately adopted and put into operation.

The process of squeezing Joseph out commenced early. After having Dunn advise Joseph early in December of 1952 of the basis of the acquisition, as set forth generally above, O'Donnell seized on a brief indisposition of his wife (who had been ill before but was constantly improving) to announce to Joseph by telephone on December 19, 1952 that he was not going forward in any way with Kinzua, and considered himself and his group out of it.

In actuality, both before and after this phone call, O'Donnell proceeded relentlessly with activity in regard to the Kinzua purchase.

He continued to look for people to operate it with him, and for outside investors to handle the half of the transaction that was all he and his Seattle friends ever felt could or intended to finance.

He went off to Palm Springs for most of the winter, meanwhile telling Coleman, tongue-in-cheek, that he was

very little interested and that possibly another organization called Georgia-Pacific might be interested. In actuality, he continued to be vitally interested. However, he wanted to secure as favorable terms from the Kinzua owners as possible. He was keenly aware that during the winter, when no one could examine the snowbound Kinzua properties, no other serious negotiations could take place; so he ran no risk by expressing such pretended indifference. He intended to and did complete the negotiations later on. He also arranged during the winter for the earliest possible inspection.

From now on until March 31, 1953, he communicated with Joseph by telephone (O'Donnell was always nervous about documentation that might reveal his plots), but in so communicating he was rather vague and cagey, and revealed nothing to Joseph of how he actually hoped or planned to make his deal. Joseph innocently and in good faith had gotten his financing ready in Chicago; he and a group of prominent Chicago businessmen stood—and still stand—fully ready and able to invest their contemplated one-half share in Kinzua.

Meanwhile, even in Palm Springs, O'Donnell conferred with the Colemans, planned later examination of the timber, made arrangements to secure management, and consolidated relationships as to financing with many of the other defendants, who were either winter residents of Palm Springs themselves, or at least made visits there during which Kinzua was carefully discussed.

When Joseph heard on December 19th that O'Donnell was getting out of the Kinzua deal, Joseph sought to secure financing for the half of the deal that his Chicago group had not already agreed to take. He went to A. C. Allyn and Company, an important Chicago investment firm, and spoke to Mr. A. C. Allyn concerning their possible interest. To Joseph, A. C. Allyn was purely a possible

substitute for O'Donnell's half of the money, a possible supplement to the participation of his own Chicago group, necessitated by what momentarily appeared to be the drop-out of O'Donnell.

O'Donnell talked to A. C. Allyn's representative. Later Allyn, having another deal going which was temporarily occupying its energy, announced in April through its Western representative that it could not proceed for a period of four to six weeks.

O'Donnell at the trial seized on this to assert two untruths; one was that Allyn was really out, or that if they were not, a delay of so many weeks was just as bad. (Actually, as O'Donnell well knew, it would in any case, and did, take far longer than that to complete the deal.) The other untruth is that Joseph had told him in phone conversations that Joseph was in the deal with Allyn, and that O'Donnell should deal entirely with Allyn.

In actuality, Joseph never told him any such thing, nor is there any documentation of such a statement. Indeed, Allyn testified he was not acting for Joseph. And the Allyn people were so poorly acquainted with Joseph's role that their Western representative Marshall, puzzled, admittedly asked O'Donnell whether Joseph was an agent. O'Donnell never had any illusions on this subject; but pretended to have, for it suited his freeze-out plot exactly.

Joseph never, even by O'Donnell's statement, told him that he'd be *out* with Allyn; only that he'd be *in* with them. Yet O'Donnell never called him after the temporary engagement of Allyn in other projects, to advise him of the fact or ask what else he wished to do.

For now it was Spring. Now the voice of the turtle was heard in the land; and the snow was gone and now Kinzua could be examined and checked out. It was, and proved eminently satisfactory. Now, by shabby cheating shifts, Allyn could be counted out, and Joseph covertly and sneakily avoided; they were.

Joseph was stalled off by a statement that a thorough examination of the timber had to be made after March 31st, and that O'Donnell then would get back to Joseph.

Now, new financing, not painstakingly concerning itself with any obligation of 5% commission to Sam Terman, could be obtained; and it was. With infinite patience and resourcefulness O'Donnell bent every effort to reach one Howard Webster, a Canadian financier of great wealth. He had to do this with some difficulty through Hugh Kelleher, a financial advisor of Webster's. (Even here, almost amusingly, we observe that O'Donnell was true to his code of squeezing out and denying any commission; the record is replete with the shabby story of how he later squeezed Kelleher out of any substantial compensation for his efforts.)

Breezily denying later he had given Kelleher the precise information, he gave Kelleher the precise information, physical and financial, concerning Kinzua Lumber Company, which enabled Kelleher to write for Webster a memorandum, persuasive and explicit, which did in fact help persuade Webster that he should invest the required 50% of the Kinzua money.

The final selling was done by O'Donnell in a single meeting of perhaps an hour with Webster—far, far less time than O'Donnell spent with Joseph in Portland.

O'Donnell acknowledges however that he regarded this verbal agreement as binding, and that consequently, since it provided for half for Webster and half for O'Donnell's group, it had to be honored and Webster given half—even though O'Donnell stated he might have been able to get up $2,500,000 or so of the earlier planned down payment and now was only required to get up less than $1,800,000, half of $3,600,000.

In August, 1953 the papers to consummate the purchase from Kinzua owners, after considerable lawyer's negotiations and work over details, were completed. No more money than the down payment ever needed to be put in. The deal was a smashing success, probably earning substantially in excess of ten million dollars after taxes. Joseph knew nothing of it. O'Donnell was found out when Joseph in later August, 1953, observed an item in a paper and wrote to O'Donnell. O'Donnell waited three weeks to reply, then wrote back a truly extraordinary letter crammed with untruths and asserting in particular that for months he had let the deal lay dormant, and then had happened to run into a Canadian and happened to make the deal (!).

Joseph and his Chicago group, then, were shut out by O'Donnell of the Kinzua purchase which had discovered and brought to O'Donnell, and agreed with him to make together and equally.

And the result is, we say, that a constructive trust exists in favor of plaintiff, as to one-half of the Kinzua stock and proceeds, subject of course to plaintiff's paying for the same as was agreed.

II.

To the Extent That, as Here, the Challenged Findings Are Necessarily Based Upon Matters as to Which There Are Admissions by Defendants and Undisputed Matters and Documentary Evidence or Such Findings Are Conclusionary in Character, the Reviewing Court Does Not Give Great Weight to the Findings of the Trial Court.

The general principle that the trial court's findings are entitled to great weight and respect by a reviewing court, sound and salutary as it is, finds its application only where those findings genuinely depend upon the trial court's evaluation of the credibility of witnesses appearing before it whose testimony is conflicting and contradictory.

However, where the reason ceases, the rule ceases also. An appellate court can, as well as the trial court, evaluate testimony which is undisputed and consists of clear admissions on the part of the parties prevailing at the trial; can read and evaluate documents and depositions as well as the trial court; and can draw conclusions from the evidence as well as can a trial court. So the cases hold; and that is the basic situation here involved.

We have, in the case at bar, one involving many admissions as to fundamental issues of fact, from the mouths of defendant witnesses; much undisputed evidence on established facts; much documentary and deposition evidence. Basically, the necessity for reversal of the lower court judgment can be shown from the admissions obtained from defendant witnesses themselves. While the evidence of plaintiff and his witnesses may help clarify the picture and place it in true perspective, it is in general principally a buttressing and support for the legal conclusions which may in any event be plainly drawn from the testimony of the defendants.

Under these circumstances, as will be shown in the following paragraphs of legal authority, this court has the capacity, the right and the duty to review with independent care, unbound by the trial court's views, the findings of the lower court.

(a) The Authorities Fully Support the View That Independent Review of the Findings in This Case Is Required.

Turning to a brief and far from exhaustive review of the cases, we find that the general principles of law above enunciated as to the freedom of the appellate court to review these findings are thoroughly supported by the general law and the cases in this court itself.

Thus, with regard to the drawing of conclusions from admitted facts, we may consider the Ninth Circuit case of *Home Indemnity Company of New York v. Standard Accident Insurance Company* (C. C. A. 9, 1948), 167 F. 2d 919, 930. Here a lower court finding that an insured driver made no false or misleading statements of fact in reporting an accident to his insurer was held clearly erroneous and reversed.

The driver admitted the making of certain statements. In concluding that reversal was required, this court stated in its opinion that the lower court:

> ". . . found . . . that the appellant 'has not been in anywise prejudiced by any action or statement or omission of George White.' This is a conclusion of law, or, at most, an inference from undisputed facts, which we are in as good a position to make as was the trial court." (P. 930.)

That is the situation here also, where only a few of many major and crucial admissions of defendants are:

> (a) The bringing to them of the Kinzua deal by plaintiff and his broker, Terman;

(b) The plaintiff's arranging a conference with the seller concerning possible sale of the property, and inviting O'Donnell and another defendant along, and their actual participation with plaintiff in the conference;

(c) That plaintiff was to raise in the east whatever he could of $2,300,000 they could not raise in the west;

(d) That defendants proceeded with many exploratory steps toward purchase of Kinzua, even while professing to plaintiff their disinterest in the deal;

(e) Months before closing the deal, the defendants ceased to communicate with plaintiff;

(f) That defendant O'Donnell sent a letter (demonstrably false and misleading) of purported explanation to plaintiff after defendants had consummated the deal, leaving out plaintiff;

(g) The inference from the circumstances that there was a joint venture.

Similarly, in *Smith v. Royal Insurance Company* (C. C. A. 9, 1942), 125 F. 2d 222, reversal of a judgment, based on a trial court's finding that plaintiff did not have tenure of a building for its life, was deemed required by this court. Because of the nature of the evidence, documentary or undisputed (as is essentially the case also), this reviewing court felt the trial court's finding did not require to be given great weight. Judge Healy, speaking for the court, said at page 224:

> "The bulk of the evidence bearing on the subject is of a documentary character or rests on circumstances concerning which there is no dispute. Accordingly, the finding of fact does not command the strong presumption of verity which usually attends a finding."

In *Gillette v. Commissioner* (C. A. 9, 1950), 182 F. 2d 1010, this court again reversed a lower court judgment on the basis that a finding (as to a gift's being made in *causa mortis*) was a mere conclusion, based on inference. Judge Stephens, speaking for the court, stated at page 1014 that the court in such a situation has ". . . the power (and we would suppose the duty) to draw such inferences as we deem proper." The rule is stated that a finding is clearly erroneous where, even though there is evidence to support it, the reviewing court on the entire evidence is left with the definite conviction that an error has been made.

Turning to the law as stated in other circuits, we see that it is precisely the same. Thus, in *Koenig v. Oswald* (C. C. A. 8, 1936), 82 F. 2d 85, the appellate court reversed the findings of the lower court in a fraud case as against the weight of the evidence, even though they were actually sustained by the spoken word from the witness stand.

In *State Farm Mutual Auto. Ins. Co. v. Bonacci* (C. C. A. 8, 1940), 111 F. 2d 412, the court once again reversed a lower court ruling based on faulty fact findings. Heavy emphasis was placed on the contradictory statements and inconsistencies of the respondent's witnesses. The appellate court regarded respondent as "a successful businessman" who should be held to some responsibility to tell a consistent story, even though he was foreign born and did not attend school after the age of twelve.

Such an attitude may be compared with that of the trial court herein. In its opinion the trial court in the present case excuses O'Donnell's inconsistencies because he is "a lumber man, familiar with forests and the running of sawmills," [Opinion, Tr. 4249], and regards his "inadequacies" as bolstering the value of his testi-

mony. (Actually, of course, O'Donnell is a Yale graduate [O'Donnell, Tr. 1411]; product of a Pennsylvania prep school [O'Donnell, Tr. 3396]; a resident of Seattle [O'Donnell, Tr. 1405]; an executive officer of a number of companies [O'Donnell, Tr. 1406-1407]; a member of the Seattle Golf Club [O'Donnell, Tr. 1407], and of a group called the "487" maintaining a larger suite of rooms at the Olympic Hotel in Seattle [Tr. 1408]. This is hardly the record of a man who is merely a bucolic woodsman, unfamiliar with words or city ways; and this is apparent from every measured, careful and evasive O'Donnell word spoken throughout his long testimony and deposition.)

With great appropriateness, the opinion in the *Bonacci* case states:

> "If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses. In Simkins Federal Practice, 3d Ed., page 488, in commenting on the effect of Rule 52(a) it is said:
>
> " 'The new practice . . . applies to all cases tried without a jury . . . and whether the finding is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony.
>
> " 'Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full weight to the special qualification of the trial judge to pass on credibility.' "

An important United States Supreme Court case is that of *United States v. United States Gypsum Co.,* 333 U. S. 364, wherein the court states and holds, in reversing a lower court decision based, as here, on faulty findings, that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

And in *Orvis v. Higgins* (C. A. 2), 180 F. 2d 537, cert. den. 340 U. S. 810, the appellate court, pointing out that evidence which might sustain a jury verdict may not suffice to support a trial court's finding, states in its opinion:

> "In the light of the Gypsum case, we may make approximate gradations as follows: * * * Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances."

Other cases showing the freedom of the court on review to examine and overturn findings are:

Keller v. Potomac Electric Co., 261 U. S. 428; and

Kuhn v. Princess Lida of Thurn & Taxis (C. C. A. 3, 1941), 119 F. 2d 704. (Incorrect conclusions by trial courts qualify as clearly erroneous findings, for the correction whereof by appeal Rule 52(a) specifically provides.)

Appellant in this brief will show that many basic findings of the lower court fly in the face of the undisputed evidence and defendants' admissions and the documentary evidence, and that other important findings underlying the judgment are really only conclusions, and conclusions directly contrary to facts.

Hence, in a true sense, the basic findings below, such as those concluding that no joint venture existed, are clearly erroneous and subject to reversal, under the rules stated and followed in the authoritative cases above cited.

III.

A Joint Venture, Both by the Evidence and by Implication of Law, Is Shown to Have Existed, and Any Contrary Finding Is Clearly Erroneous.

Despite all the arguments that will be advanced by defendants to the contrary, and despite limited denials by defendants, it is crystal clear that under the facts and the law a joint venture agreement was entered into between Joseph and O'Donnell for the purchase of Kinzua Lumber Company, with Joseph's and O'Donnell's group to raise approximately equal or equal sums for the purpose. The contrary findings are clearly erroneous [Finding V(5), Tr. 252-253; Finding XIII(1), Tr. 273; Conclusion III, Tr. 281].

This will now be briefly demonstrated by a review of the evidence and the admissions of the defendants themselves.

As previously discussed, Joseph admittedly and concededly brought word of the availability of Kinzua for purchase to O'Donnell and Chinn [Chinn, Tr. 802-803, 816; O'Donnell, Tr. 1602-1603].

Chinn met Terman and discussed Kinzua with him in Harry Joseph's office [Chinn, Tr. 859, 863-864]. Chinn and O'Donnell, some days later in Beverly Hills, called and personally conferred with Terman to find out what Terman knew of Kinzua [Chinn, Tr. 873].

Chinn himself testified that on the evening of October 24, 1952, he met with Joseph in Chicago and discussed the Kinzua stock with Joseph [Chinn, Tr. 816]. At that time Joseph showed him documentation relating to the Kinzua deal and giving considerable information about Kinzua [Chinn, Tr. 817].

Chinn then formed the idea that this was a pretty big outfit—something in the millions [Chinn, Tr. 818]. Joseph might have mentioned the acreage, but Chinn did not remember what was said in that regard [Chinn, Tr. 843].

Chinn asserts when he came to some of the figures involved, on November 19, 1952, he "got kind of cooled off." [Chinn, Tr. 844.] Nonetheless, that evening he went home and called his sister on the phone in Seattle [Chinn, Tr. 850] to ascertain the name and whereabouts of persons whom he believed were related to the owner or principal stockholders in Kinzua [Chinn, Tr. 850].

Calling them, Chinn was told that the person to talk to was Joe Coleman, the manager of Kinzua [Chinn, Tr. 852], who ". . . is the one that knows the whole story about Kinzua." [Chinn, Tr. 852-853.] Joseph then made this contact for Chinn and O'Donnell.

(It is important to remember throughout that, as is undenied [Joseph, Tr. 443], the Kinzua interests were only dealing with one prospective purchaser at a time. Therefore, since Joseph was the one who originally con-

tacted the Kinzua interests through Coleman, the opportunity to deal with them was peculiarly his, and O'Donnell in silently stealing it from him stole something which was unique and valuable, as well as being something entrusted to him as a converter, not for himself.)

Then Joseph (not O'Donnell or Chinn), concededly and admittedly, arranged with Coleman a meeting in Portland to discuss the Kinzua purchase [O'Donnell, Tr. 1611-1612]. To this he invited Chinn and O'Donnell.

And so it was that on November 18, 1952, Chinn and O'Donnell joined Joseph at the Old Heathman Hotel in Portland, where they registered together [Chinn, Tr. 894, 900].

They met together, in pursuit of a common interest and objective. They did not meet as strangers, for Joseph undisputedly had known Chinn for some twenty years [Chinn, Tr. 788-789], during which he had been engaged with him in numerous business deals. As a result of this long association, there was clearly a mutual trust and esteem. Chinn testified that he regarded Joseph as a man of honesty and as a business-like person of integrity [Chinn, Tr. 3227].

Too, Chinn and O'Donnell had known one another intimately, both as business associates and social friends, for a period of twenty years; they had been intimate friends for ten to twelve years [Chinn, Tr. 786-787]. Thus, when Joseph and O'Donnell met, they were introduced to each other and recommended to each other by Chinn, and did not deal as strangers, but as men whose integrity and standing had been vouched for by Chinn, whom they both trusted.

The assumption would be far-fetched that two experienced businessmen such as Joseph and O'Donnell would go to an important meeting, flying hundreds of miles to do so, and start negotiations with the authorized repre-

sentative of the sellers for purchase of a timber empire, without first having arrived at some understanding as to their relations as between themselves.

Evidentiarily, an extraordinary situation now develops, fatal to the credibility of Chinn and O'Donnell. Chinn and O'Donnell both testify that they can recall virtually nothing of the long afternoon and evening which they spent together [Chinn, Tr. 894, 901; O'Donnell, Tr. 1619].

Until confronted in depositions with the documentary evidence that they did in fact register along with Harry Joseph that evening, and did attend the University Club there with him, they coolly denied having met with him at all that evening.

When thus confronted, they calmly changed their stories, and admitted, of necessity, that they had in fact met with Joseph on that day as the documents showed, and spent a long evening with him.

Each of these defendants however, as though linked in some grotesque and highly improbable amnesia, calmly continued to deny any recollection of anything whatever that was said between these three intelligent and articulate people during the hours they spent together that evening [Chinn, Tr. 894, 901; O'Donnell, Tr. 1619]. "That was a long while ago," says O'Donnell calmly, though recalling in other portions of his testimony much which serves him, of equally ancient vintage.

This is characteristic of the testimony of defendants Chinn and O'Donnell throughout; they admit adverse things only when such admissions are forced upon them, regardless of the frequent grotesqueness of their testimony. The best that can be said by them of their testimony on this particular evening is simply that they felt they would have recalled it if there had been such discussion of the subject of a joint venture.

That there was conversation that evening is plain. That it must have borne a relationship to the only reason they came to Portland—to enter into negotiations for the purchase of Kinzua—is also plain. The denial of Chinn and O'Donnell is inherently incredible.

We have before this court the substantially uncontradicted testimony of one witness—Harry Joseph himself, whse integrity Chinn himself, over a period of many years, does not challenge. Joseph testifies that there was (as common sense tells us this is true) animated discussion on this subject that evening. Joseph tells us too what that conversation was. We now set it out.

First, while walking to the University Club for dinner, Joseph with characteristic integrity made it clear to O'Donnell that Terman had brought the deal to him, that it was to be kept confidential, and that Terman expected a five per cent commission [Joseph, Tr. 373]. O'Donnell regarded that as high,* and there was discussion

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*O'Donnell in this case boasted grimly "I never paid a commission on a lumber deal" [O'Donnell, Tr. 3473]. This casts vivid light on the consistency of his pattern in trying to eliminate joint venturer Joseph, who stood firmly for paying Terman his commission.

Later in this deal he waged a sordid battle to freeze Kelleher out of a commission, although he had used him extensively in contacting Webster and whetting his interest in taking 50% of the Kinzua deal [O'Donnell, Tr. 1446-1448]. O'Donnell coldly threatened Kelleher with calling off the entire deal unless assured he and his group would have no commission liability to Kelleher [Exs. 62, 72 and 74].

He also did not hesitate to tell Kelleher, in an untruth admitted on trial, that he had tried to reach Webster directly before calling Kelleher [Ex. 74; O'Donnell Tr. 1436]. These brass knuckle tactics forced Kelleher to capitulate after a further battle summed up in Exhibits 79, 80-83, 85, 91, 101, and 105-110.

Kelleher commented of O'Donnell that ". . . his telegram to me was nothing short of blackmail" and that O'Donnell "has started chiseling on his deal with Webster" with regard to salaries, additional overrides, etc. [Ex. 108]. Shoemaker, tried to console Kelleher for O'Donnell's "shabby action," telling him that O'Donnell's chiseling tactics should solidify Kelleher's relationship with Webster [Ex. 109].

as to whether Terman would agree to take it partly or entirely in some other form than cash [Joseph, Tr. 373].

Then, at the club, Joseph told what he had learned from Terman about Kinzua [Joseph, Tr. 375], and the following conversation took place:

> "O'Donnell said to me, he said, 'Joseph, what do you have in mind on this deal?' 'Well,' I said, 'O'Donnell, Raleigh told me all about you, and he has implicit confidence in you, and he is associated with you, and I understand you have been very successful as an operator, and I am looking for someone that we can get into this thing that can handle this thing out here for me. I am not a sawmill operator, and if the deal looks all right to you and looks all right to ourselves, we will take a 50 per cent interest, and you fellows take a 50 per cent interest,' and he said, 'That is all right with me.'" [Joseph Tr. 373-374.]

That is the simple outline of the agreement. Not only is it believable in itself, and not only is it really undenied, but as we will see, it is consistent with the character and temperament of both Joseph and O'Donnell, and consistent with the actions of Joseph and O'Donnell in the months to come.

Then the meeting was held the next morning, November 19, 1952, with Coleman, in which an outline of the deal was concededly explored in some detail [Joseph, Tr. 377]. The others were to contact Coleman later, after thinking about it [Joseph, Tr. 379].

After the Coleman meeting, Joseph asked O'Donnell in a brief conference whether he should go back home and get started on the financing of the deal. O'Donnell told Joseph no, to let him, O'Donnell, handle it and that he would report back to Joseph [Joseph, Tr. 382].

Now, there we have the agreement so far as it required and at this Portland meeting received oral ex-

pression. It did not depend on the specific price or terms of Kinzua; but that is what business venturers normally face. When they enter into business, they do not know what vicissitudes or problems they will face; they only agree that they will face them together. That is what was done here.

In the trial court, defendants sought to make much of the asserted anomaly of two groups meeting and in one meeting agreeing, and orally agreeing, on the terms under which they would together venture. The trial court's opinion also adverts to this [Tr. 4257]. However, this is not only a common-sense thing to do, and very expectable, but it is *exactly* how O'Donnell himself boasted he completed the deal later with Webster.

For proof of this last statement, let us turn to the testimony of O'Donnell himself. He proudly states that when he met with Webster in Los Angeles on May 9, 1953, the whole meeting lasted an hour, or maybe not that long [O'Donnell, Tr. 1550]. Although O'Donnell had wanted control, he agreed in this first meeting with Webster to give Webster fifty per cent [O'Donnell, Tr. 1557]. "The whole deal was made in an hour's conversation or less, everything." [O'Donnell, Tr. 1558.] Not a scrap of paper was signed between them. Of course the problems of negotiating the terms of sale were not there resolved, and the fulfillment of the arrangement necessarily hinged on their mutual satisfaction with the terms that would be worked out with Kinzua's sellers.

O'Donnell then, avowedly did with Webster the very thing which his attorneys' profess to find so unlikely with Joseph. Unlikely? Not at all; it *happened,* so it is surely the kind of thing that was likely for O'Donnell.

Indeed, O'Donnell, having pursuant to such arrangement gone on and closed with the seller for a lower down payment than was originally discussed, comes forward

with a boast at the time of trial that he could not back away from his oral deal. Having entered into the oral arrangement with Webster for fifty per cent, he could not back away from it, even though the sellers suggested that by reducing the down payment O'Donnell and his group could take more than fifty per cent [O'Donnell, Tr. 1961-1962].

Also citing one relevant case, *Benton v. Blair* (C. A. 5, 1956), 228 F. 2d 55, 59, we observe that the court reversed a district court's dismissal under Rule 41(b), based on the district court's finding that there was no orally entered into joint venture. The court said in its opinion:

> "We find nothing in the plaintiff's case here which renders suspicious or inherently improbable his assertions that an oral contract was made between the parties for an equal sharing of the profits of deals made by Blair with Benton's contracts . . . we cannot fairly say that there is anything inherently improbable in two businessmen, even on first acquaintance, making such an oral agreement, and relying on personal honor—or 'mutual trust and confidence,' as Benton so often put it—as the only sanction of enforcement."

Another factor reinforcing with great strength Joseph's basically uncontradicted version of the oral agreement of November 18, 1952 is the later actions and statements of O'Donnell.

For instance, O'Donnell throughout, as was manifested time after time, indicated that while his group desired operation control, they were not prepared to raise much if any more than half the money [O'Donnell, Tr. 1463, 1813, 3352].

The rest of the money would have to come from somewhere; no other genuinely available source than Joseph was seriously considered by O'Donnell outside of A. C. Allyn & Company, which Joseph himself brought in, and outside of the Webster interests which months later O'Donnell employed. O'Donnell must have considered, and did consider, that the rest of the money should come from Joseph.

He himself testified grudgingly that, as early as November 26, 1952, it was "quite possible" he had told his bankers in financing discussions that he "was going to take anything he could get out of Chicago." [O'Donnell, Tr. 1702.]

O'Donnell admits again and again that the Western group was to raise about one-half of the money, and that the rest was to come from Joseph. Thus, asked where was the two million three to come from, he replied, "Harry Joseph was to get whatever he could back east," [O'Donnell, Tr. 1813], and that we were going to get half the deal and going to get control of it. This implies another group; but O'Donnell does not seriously claim that any other group but Joseph was involved.

And yet again, O'Donnell admits that after Joseph found out what he could raise, he was to let O'Donnell know, and they would "probably have to work something out." [O'Donnell, Tr. 1735.] Continuing:

> "Q. You would decide how much he could get? A. Yes.
>
> Q. You would decide? A. Oh no, I wouldn't decide. I didn't have any more right to decide than he had to decide . . ."

In O'Donnell's deposition, which is in evidence, and in an uncorrected passage, O'Donnell states, responding to a question as to how much money the Chicago group was to raise:

> "A. Whatever we couldn't raise. . . .
>
> Q. Well, on January 5, 1953, it was your understanding, then, that your agreement with Harry Joseph was that you and your group were to provide such financing as you could and that Harry Joseph was to provide whatever was left over? A. We didn't have any definite agreement with him. We merely said we would see what we could raise and what he could raise, and when it looked like the money was available the thing would be adjusted.
>
> Q. You mean you would just start to raise as much as you could and after each side had done that, the O'Donnell group and the Joseph group, you would get together and allocate it, is that right? A. That is right." [O'Donnell, Tr. 3555.]

From such evidence, it is clear that, even aside from the explicit and virtually undenied testimony of Joseph as to the joint venture agreement, O'Donnell himself admits the agreement by saying, for instance, that "when it looked like the money was available the thing would be adjusted"; the O'Donnell group and the Joseph group were "to get together and allocate it." [O'Donnell, Tr. 3555.] Parties do not need to sit down and write lengthy documents labeled joint venture; if they say words and behave in a way which under the law constitutes them joint venturers, they become joint venturers. That is what was done here by O'Donnell's testimony—even apart from and beyond Joseph's virtually undenied testimony.

(a) To Show How the Parties Lived the Agreement as Well as Made It, Appellant Asks This Court to Incorporate, as Further Evidence of the Existence of a Joint Venture, the Sections Dealing With the Conduct of O'Donnell and Joseph, and Its Necessary Implication of the Existence of a Joint Venture Agreement.

With regard to the conduct and speech which imply the agreement, appellant asks that this court consider as further evidence of the venture which inescapably existed between O'Donnell and Joseph, the immediately following sections. These deal with the conduct of O'Donnell and Joseph, which conduct

(1) itself constitutes the substances as well as the most telling and inescapable evidence of the existence of such a joint venture agreement through the behavior of the parties; and

(2) itself renders incredible and indeed preposterous any attempted denial (even had there really been one) of the existence of the express agreement of November 18, 1952.

We urge that examination of the conduct of Joseph and O'Donnell, set out in these following sections, will readily show the court that the parties would never have behaved as they did had there not in fact been between them a joint venture agreement. Had there been no such agreement, the conduct of each would have been a gigantic riddle, a meaningless charade. Since there was in fact such an agreement, their conduct is readily explicable.

O'Donnell, from his conduct (up to the betrayal), plainly appears as one feeling reluctantly obliged to honor his obligations to his co-venturer whom he dares not yet thrust out of Joseph's own deal, and whose equity money he feels he may need. But how earnestly he wishes he could get rid of the Terman commission obligation which Joseph refuses to avoid!

Joseph appears as one who confidently, honorably and straightforwardly found both the deal (and later O'Donnell as a partner in it), raises the necessary money and continues to function in the situation in trust and good expectation, resting on his co-venturer's original agreement and later promise to report—and then is struck by a bombshell when from a trade paper he reads of his co-venturer's deceit.

From these positions—as assuredly not from the viewpoints taken by the trial court or defendants—the conduct of O'Donnell and Joseph makes good sense, and is perfectly explicable and rational.

IV.

Defendant O'Donnell's Conduct for Many Months After November 18, 1952, Inescapably Admits the Existence of the 50-50 Joint Venture of Joseph and O'Donnell to Negotiate the Kinzua Purchase.

The facts in this case, very many of them admitted, show that O'Donnell not only entered into a joint venture agreement with Joseph to negotiate for and acquire Kinzua; he also acted for many months in conformity with such an agreement having been entered into and continuing to exist.

Before November 18, 1952, and the Making of the Joseph-O'Donnell Agreement.

Of course, there is no possible doubt that O'Donnell and his group in the early stages followed Joseph's lead entirely. It was Joseph through Terman who ascertained the existence of the opportunity for purchase, undeniedly [Joseph, Tr. 325; Terman, Tr. 1161, 1171]. It was Joseph who met with Chinn in Chicago on October 15, 1952 [Pretrial Order, Tr. 155], and who admittedly told Chinn of the deal not later than October 24, 1952 [Joseph, Tr. 334-336; Chinn, Tr. 816, 859, 863-864].

Chinn relayed Joseph's and Terman's information on Kinzua to O'Donnell, who thus learned of the deal [Chinn, Tr. 839; O'Donnell, Tr. 841]. It was Terman who, after Chinn had told O'Donnell of Kinzua, spoke of it further to Chinn and O'Donnell at Chinn's request on November 6, 1952 [Chinn, Tr. 841, 873]. It was Joseph and Terman who undeniedly arranged the meeting with the agent of the seller, Joseph Coleman [Joseph, Tr. 361; Terman, Tr. 1225-1226], which meeting was held on November 19, 1952. It was Joseph who called and advised Chinn of the meeting [Chinn, Tr. 878-879], and it was by agreement with Joseph that O'Donnell came to Portland [Chinn, Tr. 879] for the full and authentic word on Kinzua from Coleman.

As we discuss elsewhere, the complete blackout by O'Donnell and Chinn [Chinn, Tr. 901-902; O'Donnell, Tr. 1619-1620] as to the contents of the full evening's discussion of November 18, 1952, is monumentally unconvincing; Joseph is the only one who testifies as to the contents of the evening's conversation in so far as it relates to the joint purchase of Kinzua by Joseph and O'Donnell [Joseph, Tr. 373-374]. His testimony is clear and natural—that there was an agreement between Joseph and O'Donnell to negotiate for and acquire Kinzua jointly and equally.

After November 19, 1952, and the Making of the Joseph-O'Donnell Agreement.

One test of the existence of that agreement is the manner in which the parties dealt with regard to one another thereafter. This is what we will analyze; and it shows plainly that, no matter how reluctantly, O'Donnell conceded by his later conduct toward Joseph over a period of months that he and Joseph were bound up together in the deal for acquisition of Kinzua.

Of course O'Donnell, a West Coast man, was the man on the scene for the purchase of this west coast property. Now there was someone here to carry the ball on the West Coast aspect of the deal.

Joseph went home to Illinois and, as the testimony shows beyond the shadow of a doubt and without challenge, went home and spoke with wealthy and prominent people, issued a prospectus and got together the money required to make his half of the deal.

But O'Donnell, out on the West Coast, unfortunately for his position on this appeal, could not and did not ignore Joseph. For example, he knew he had to, and he did, provide the information to Joseph so that he could raise his money in Chicago for the deal. On or about December 5, 1952, as Dunn, O'Donnell's attorney, himself testified, O'Donnell told Dunn he'd talked to Joseph and Joseph "wanted some ammunition to try to interest people in Chicago in the possible purchase of Kinzua" [Dunn, Tr. 1009-1010]. Obedient to O'Donnell's requirements and Joseph's, Dunn called Casey, a Kinzua attorney, to fill out the corporate picture of Kinzua [Dunn, Tr. 1011].

Then, still early in December, 1952, Dunn called Joseph and gave him a great deal of information about the method of Kinzua's acquisition plan, as directed by O'Donnell [Dunn, Tr. 1010; O'Donnell, Tr. 1710-1711].

Dunn admits he understood in this call that Joseph was going to try to interest Chicago investors and perhaps make some investment himself [Dunn, Tr. 1066] (though he says he did not believe Joseph's investment would be large).

Joseph, in preparing his prospectus for his group [Ex. 381], stated therein that the Seattle group had agreed to take 50% or three million dollars of the necessary

equity money, and that it would be necessary for the Chicago group similarly to raise three million dollars. (Some few days later, advised by O'Donnell that he was going to drop out of the deal, Joseph revised the prospectus given to certain investors [Ex. 391] and deleted the statement as to the Seattle and Chicago groups each raising three million dollars [Joseph, Tr. 462].) This prospectus was a contemporaneous document, and it is interesting and significant to note Joseph's statement therein, for the benefit of his investors, taking the same position that he has taken throughout the lawsuit—that O'Donnell and his group were to have 50% and Joseph and the Chicago group were to have 50% [Ex. 381].

O'Donnell, who was very wary of anything in writing in this deal, has virtually no memoranda; but, as discussed elsewhere in this brief, the documents of Terman and Joseph, such as the prospectus itself, are consistent with plaintiff's position and reinforce it.

We turn back to the question of the O'Donnell-Joseph relationship. Joseph testifies that there were many conversations with O'Donnell in December—about O'Donnell's arranging to go to the woods [Joseph, Tr. 432]; about whether Joseph would take less than 50% (he wouldn't) [Joseph, Tr. 433]; about whether they would have to pay the 5 per cent commission to Terman [Joseph, Tr. 434], and so on.

O'Donnell himself testifies he'd called Joseph in Chicago around December 5, and told Joseph he'd been down to Portland on the Kinzua transaction [O'Donnell, Tr. 1681]. O'Donnell, who denied this on deposition, now admits it because his phone bills show the call [O'Donnell, Tr. 1681].

The same phone bills force O'Donnell to admissions that there were two more phone calls to Joseph in Chicago on

December 11, 1952 [O'Donnell, Tr. 1742], discussing the financing.

O'Donnell states he told Joseph of the meeting with the bankers to impress the Colemans "that we were able, the kind of people that they were looking for to buy the plant . . ." and that there was a discussion of a joint loan of six million dollars by three banks [O'Donnell, Tr. 1743]. He told Joseph: ". . . if they were talking at least about a 6 million dollar loan, why that timber had some value and it was something for him to use as ammunition to raise some money." [O'Donnell, Tr. 1743]. He also told Joseph that "we," presumably some of the Western investors, had kind of agreed they would probably invest half a million dollars apiece if the deal was all right and finally developed [O'Donnell, Tr. 1744].

O'Donnell also told Joseph that Coleman had waived a previous $600,000 deposit requirement, and that he was taking Mr. Kesterson in "and we had in mind to manage it." [O'Donnell, Tr. 1745.] The furnishing of such interim reports is not the kind of thing that is done for an outsider.

Elsewhere in this brief we discuss the total insincerity of O'Donnell when on December 19, 1952, he called Joseph [Pretrial Order Stipulation, Tr. 157] and told him he was out of Kinzua. In the present context we comment merely on the fact that O'Donnell spoke to Joseph, admittedly, about his supposed decision on the very day it was supposedly made and gave a "report on the property," and "a general report on the mill too." [O'Donnell, Tr. 1785-1786.]

The obligation to provide some explanation to Joseph for O'Donnell's extraordinary "drop-out" seems to have been felt quite strongly by O'Donnell; once again, this is not what he would have done for an outsider, or anyone who was not a substantial part of the deal.

It should be noted too that O'Donnell, asked where the rest of the money for Kinzua was to come from, conceded that "Harry Joseph was to get whatever he could back east" [O'Donnell, Tr. 1813], and offered no other explanation of where he was going to get the money. At this point O'Donnell did not have, or dare to assert that he had, any other source than Joseph for the other needed half of the deal.

O'Donnell admits too that around November 26, 1952, it was "quite possible" he'd told his bankers he was going to "take anything he could out of Chicago." [O'Donnell, Tr. 1702.] These, and other statements discussed elsewhere in this brief, make it clear that O'Donnell leaned on Joseph for the money required over the one-half that O'Donnell's group intended to raise [O'Donnell, Tr. 1735, 3555, etc.]. This again is of course evidence that the parties in fact acted in strict accordance with their being a joint venture, involving the raising by them of the necessary money.

Then, between December 31, 1952 and January 5, 1953 [Pretrial Order Stipulations, Tr. 158]. O'Donnell again called Joseph and discussed the interest displayed by A. C. Allyn & Company, through Marshall [Pretrial Order Stipulations, Tr. 158]. O'Donnell again tried to ease Joseph out of telling him he was very lukewarm on the deal, but that he could raise two and a half million [O'Donnell, Tr. 1810-1811]. It is interesting to note that he did not dare to claim he could raise all the money, and that he kept discussing with Joseph the raising of money.

Also, while as we elsewhere show it is entirely untrue that Joseph said he was with the Allyn group, it is significant to note that O'Donnell felt himself compelled so to testify [O'Donnell, Tr. 1811]; for the clear fact is that he dared not say—now or ever—that he desired to throw

Joseph out. By the device of falsely claiming Joseph's alignment with the Allyn group, O'Donnell still finds himself *admitting* that Joseph was in the deal; this is not a denial of Joseph's being a part of the deal, but only a shuffling of him to one side where he tried to dispose of him later. Joseph, in other words, O'Donnell in effect still concedes, was in the deal, only with another group.

And indeed O'Donnell admits in his deposition [O'Donnell, Tr. 3555], that on January 5, 1953, *after* the alleged O'Donnell drop-out, his group "would see what we could raise and what he (Joseph) could raise, and when it looked like the money was available the thing would be adjusted," though he does deny the existence of a "definite" agreement.

O'Donnell, who denied in his deposition *any* February conversation with Joseph [O'Donnell, Tr. 1823], admitted such a conversation on the trial, once again after being forced into it by the records [O'Donnell, Tr. 1823]. Confronted by the evidence that Joseph wrote to him on February 27, 1953 [Ex. 52], and commented on the call, as well as on "operations such as we talked about on the phone," O'Donnell was compelled to testify thus. The call was made from the office of Donover Company, O'Donnell's family corporation in Beverly Hills [O'Donnell, Tr. 1824]. O'Donnell told Joseph he was going to meet Coleman and ask him to put a man in to look at the Kinzua timber [O'Donnell, Tr. 1825].

Joseph's testimony fills in further interesting and significant details; he knew, as was true, that Joe Coleman's brother had called O'Donnell to arrange the meeting [Joseph, Tr. 454], and he remembered a discussion with O'Donnell of a management fee requested by O'Donnell [Joseph, Tr. 455-456]. O'Donnell does not even deny this conversation, but states with customary evasiveness that he cannot remember the conversation [O'Donnell,

Tr. 1825]. Once again we find O'Donnell dealing with Joseph as a part of the deal.

The parties understood that nothing could be finally done till the lumber had been inspected; it was winter, when snow prevented inspection. The next and, as it happened, final contact between Joseph and O'Donnell, before O'Donnell secretly dealt without Joseph, came on March 31, 1953 [Pretrial Order Stipulations, Tr. 158]. Just before it, O'Donnell states, he received and discussed with Marshall and Dunn an optimistic and favorable report from Price, the expert lumberman, to the effect that the timber had been looked at, that the quality was good and that the volume was probably as represented by Coleman [O'Donnell, Tr. 1836-1837, 1839-1840; Dunn, Tr. 1035-1036].

Then O'Donnell called Joseph, admitted he had a good report from Price, and would look the thing over [O'Donnell, Tr. 1840-1845]. O'Donnell states that he again asked if Joseph was with the Allyn group (again showing that he felt bound to fit Joseph in), and says that Joseph told him he was with Allyn, would be right along with them and that O'Donnell should do his business with Marshall [O'Donnell, Tr. 1841]. Untrue as this statement by O'Donnell is, it shows yet again that an obligation was owed to Joseph, and that he was definitely supposed to fit into the deal as an investor.

Unbelievably, O'Donnell says there was to be further examination, but that no report back was discussed [O'Donnell, Tr. 1841].

Joseph testified that in this conversation O'Donnell told him he was trying to get hold of a fellow named Price, formerly with Walker and Weyerhauser, to inspect Kinzua and arrange a cruise [Joseph, Tr. 464-465]. Also, O'Donnell was to report back when the cruise was complete [Joseph, Tr. 467]. Joseph's recollection in this

regard is documented by his memorandum [Ex. 57], which indicates that Joseph noted that O'Donnell then said that Price, of Walker and Weyerhauser, was to go to the Kinzua property and O'Donnell would report later.

In cross-examination, defense sought to make much of the fact that the memo at one place bore the date "3/10/53," and that on deposition Joseph, relying on that note, thus dated the call [Joseph, Tr. 2507], though O'Donnell would not on that date have been in Seattle [Joseph, Tr. 603, *et seq.*]. However, Joseph indicated even on deposition that his reason for thinking that was the date was the date notation on the corner of the memo [Tr. 2507], rather than independent recollection.

Since admittedly there was in fact a conversation—and only one—between Joseph and O'Donnell in March 1953, its inadvertent misdating by Joseph is of transcendentally slight importance. It is also quite possible the date referred to one mentioned by O'Donnell in the conversation. Significantly too, Joseph on August 27, 1953, wrote to Terman and said, long before suit, that:

> "The last time I talked with you, you will remember, my last conversation with O'Donnell was that he was waiting for a Mr. Price, who, at one time or another, was part of the Weyerhauser & Walker interests, to come to Seattle and then go down to the mill and go over the standing timber of the Kinzua Pine Mills." [Ex. 87.]

It should be noted in considering the testimony on this conversation that this call of March 31, 1953, was made at a time when O'Donnell, by his own testimony, had made no decision to purchase Kinzua. He testified himself that that determination was not made until about April 15, 1953, some five days after he and Stuchell had examined the properties themselves [O'Donnell, Tr. 1553].

O'Donnell, perhaps not realizing the tremendous import of his testimony, admitted that he told Joseph that he was planning further investigation [O'Donnell, Tr. 1841], and meant by that the cruise made in June of 1953 by Henry Thomas [O'Donnell, Tr. 1842], "plus a lot of investigation on our personal part" [O'Donnell, Tr. 1844], of the whole deal.

On this state of admissions by O'Donnell as to the plan for investigations and his advising Joseph of the plan, it is fantastic to believe that the matter was left on March 31, 1953, so that Joseph had no right to believe that a further report should and would come to him from O'Donnell.

Now however O'Donnell went on to break the faith. Pushing Joseph out of Joseph's own deal, O'Donnell went ahead and made a deal; now, and now only, did he openly act in relationship to Joseph in any way that would negate the existence of a joint venture. Even now, the way in which he replied later when Joseph queried him as to what had happened, was interestingly equivocal.

In O'Donnell's damningly untruthful letter of September 22, 1953 [Ex. 93], he states:

> "When your group told me that they had lost interest in the Kinzua deal because of other utility deals, et cetera, that they had been interested in, I more or less dropped the matter and it lay dormant for a couple of months."

Once again, we see O'Donnell admitting Joseph had been a participant, but trying to shove him off as being part of Allyn and then saying *Allyn* had lost interest. (This would not explain why O'Donnell did not get back to Joseph with some report on the timber and on Allyn's supposed drop-out, but there are limits to how much explaining O'Donnell or anyone would be able to do in the face of the facts.)

Also, in stating to Joseph [O'Donnell, Tr. 1906], though admittedly untruthfully, that he let the matter lay dormant after the group that O'Donnell urged was Joseph's dropped out, O'Donnell once again concedes that the envisaged relationship between himself and Joseph was one which was very important to the deal; so important that without him the deal fizzled, and allegedly nothing whatever was done for months, and that then it was an unplanned accident that O'Donnell happened to run into some other person who could make the deal work out.

Thus, at this final moment as throughout, we find O'Donnell's conduct admits Joseph had been his coventurer.

V.

Joseph, Despite the Findings of the Trial Court, Which Are Clearly Erroneous, at All Times Intended to, Worked to, and Was Prepared, Ready and Able to, Participate Equally With O'Donnell's Group in the Purchase of Kinzua Lumber Company, and These Facts Were Well Known to Defendants.

The findings of the trial court fly directly in the face of the evidence with respect to the question of Harry Joseph's intentions, efforts and ability to participate equally with O'Donnell's group in the Kinzua purchase, and with regard to the knowledge by defendants of these facts, the findings, some of which will be set out in brief summary fashion, are clearly erroneous to the extent that they purport to deny Joseph's intentions, efforts and ability to participate in the Kinzua purchase.

Generally, the findings attempt to paint the picture of a situation in which Joseph knew very little about the Kinzua deal, made no arrangements with O'Donnell or Chinn about it, and regarded both the important Port-

land meetings and subsequent discussions as being merely exploratory, with no one bound to any course of action or conduct. But the facts are entirely contrary.

Thus, in its opinion (blanketed in, in its entirety, in the findings [II, Tr. 247]), the court urges that at the time of the Portland meetings of November 18th and 19, 1952, Joseph did not know much about the Kinzua properties or the basis of their possible purchase, and that particularly, as to Joseph:

> "Joseph didn't know much about it. All he knew was that Terman said Kinzua was for sale. That is all. There is very little more that Joseph knew about it." [Opinion, Tr. 4256.]

The trial court also finds that the information the parties had even after November 19, 1952, was insufficient to determine if purchase of Kinzua stock was feasible [Finding V(4), Tr. 252], and that neither party ever intended to become or did become the agent of the other in any respect, or entered into any understanding with any of the others [Finding V(5), Tr. 252-253]. *All* discussions were "exploratory" only, and there was no meeting of the minds nor was anyone bound expressly or by implication to any course of action or conduct [Finding V(5), Tr. 253]. Joseph never indicated he would invest any money or that anyone might invest in Kinzua [Finding VIII(6), Tr. 261].

The conclusions of law are that there was no joint venture; there was no relationship between O'Donnell and Joseph, and if there was any it was terminated by March 31, 1953; if it was not terminated defendant O'Donnell believed reasonably that the relationship ceased to exist [Conclusions, III, Tr. 280; Conclusions, VIII, Tr. 281].

The findings do not bother to say a word, pro or con, regarding the result of Joseph's earnest and successful efforts to get together large amounts of financing in Chicago.

The findings then, in summary, paint a picture of a know-nothing, do-nothing, say-nothing plaintiff who is in glaring contrast with the real-life Harry Joseph whose activities are portrayed, often documentarily, or undeniedly, in the pages of this transcript. This is the Joseph some of whose actual words and actions we will briefly summarize in this section, in showing how extraordinarily erroneous are the findings and conclusions of the trial court.

This Harry Joseph is owner of a prominent Chicago lumber company, and a man of honor and public service in the community.* He has been the director of several banks, was appointed by the Comptroller of the United States to liquidate over twenty national banks, which assignment he completed, and has served Chicago as President of the West Chicago Park Board and a Vice-President of the Chicago Park Board and is presently a member of the Community Conservation Board of Chicago [Joseph, Tr. 316-319].

(a) Admittedly, Joseph Found the Kinzua Deal and Made It Known to O'Donnell and His Group.

That Joseph and Terman found the Kinzua deal, and that it first became known to Chinn and O'Donnell through their efforts, is not even denied, but on the con-

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*We offer as a character witness for plaintiff, to assist the court in evaluating this matter, Raleigh Chinn himself, who though a defendant himself, felt forced to concede, based on a business intimacy of twenty years, that ". . . as far as I know, he never made me feel that his integrity wasn't all right." [Chinn, Tr. 3227.]

trary is explicitly admitted [Chinn, Tr. 802-803, 816, 839; O'Donnell, Tr. 1602], and is dealt with at somewhat greater length in another section of this brief.

(b) Joseph and Terman Seriously Sought to Get Information and Make Necessary Contracts Re the Kinzua Purchase Even Before O'Donnell Was in the Picture.

Joseph and Terman strove at all times to clear the road for the purchase by Joseph and O'Donnell.

It should be noted that there was unquestionably earnest and serious activity on the part of Terman, for Joseph, directed toward the Kinzua purchase, even before the parties ever went up to their important meeting in Portland. As early as September 26, 1952, following considerable prior activity, Terman wrote a significant letter [Ex. 11] to Joseph Coleman of the Kinzua Lumber Company. He stated that the subject of his letter was the possible purchase of the stock of Kinzua, and that:

> "I represent Mr. Harry Joseph, President of the Joseph Lumber Co. of Chicago, who had indicated to me, interest in acquiring your Company."

He urged that Mr. Joseph and his associates were men of integrity and responsibility, who would qualify in every way for such an undertaking. He asked that a meeting be arranged.

This letter shows how energetic, genuine and early was the interest of Joseph in the Kinzua purchase—long before O'Donnell could have been a factor. Terman also wrote to Joseph [Ex. 12], enclosing a copy of the letter to Coleman.

A few days later, Joe Coleman wrote back to Mr. Needleman, the Beverly Hills lawyer for a large Kinzua stockholder, and himself a Kinzua director, noting the

Terman inquiry and stating that he would let Needleman know in the future about the reaction to Terman's approach [Ex. 14]. Ultimately of course this approach ripened into the November 19, 1952, meeting.

With regard to information obtained by Joseph and Terman, we can briefly point out that Chinn himself says that on October 24, 1952, Joseph showed him a letter of a couple of pages about the deal, and a separate sheet showing "a rough draft of a company's condition in figures" relating to Kinzua, not a complete balance sheet, "and in looking over the figures I remembered that I formed an idea that 'Well, it is a pretty big outfit,' something in the millions" (though perhaps not more than three or four millions) [Chinn, Tr. 817-818].

Joseph also testifies that at this meeting he had the Kinzua 25th anniversary brochure, showed it to Chinn and reviewed with Chinn the acreage, how much lumber, where it was located, the existence of a railroad, planing mill, hospital, school, etc. [Joseph, Tr. 346]. He also discussed the 50-50 interest that Joseph and O'Donnell were to take, both at this meeting and on the earlier one on October 15 [Joseph, Tr. 347].

It was Joseph who, on November 7, 1952, called Coleman back [Ex. 20], got information about Kinzua (including the price, though O'Donnell denies this as to price, saying that the price came as a surprise to Joseph at the November 19 meeting), and admittedly set up the meeting in Portland, including permission to bring Chinn and O'Donnell along [Joseph, Tr. 354-360].

Coleman had already been interested in Joseph as a possible purchaser by Terman's efforts with the Gold & Needleman firm, and by Terman's letter to Coleman about Harry Joseph being a prospective purchaser of integrity

and ability [Exs. 11-15; Needleman, Tr. 2719, 2728, 2736, etc.].

We will not go again through the actual meeting in Portland of November 18 and 19, 1952, other than to comment that admittedly Joseph attended with Chinn and O'Donnell, and that admittedly the deal was explained at the meeting by Casey, the attorney for Kinzua, along with the price [Chinn, Tr. 915; O'Donnell, Tr. 1632-1636].

Admittedly too O'Donnell stated that the price might not be bad if the sellers had as much assets and timber as they said they had [O'Donnell, Tr. 1644]. (In this connection it should be noted that O'Donnell admits that it was not until the following June that a cruise was taken which could determine that Kinzua owned the timber that was represented to exist) [O'Donnell, Tr. 1570]. We omit here detailed discussion of the difference between O'Donnell and Joseph as to what was said after the meeting; but even O'Donnell admits that Joseph said some of his Chicago friends might be interested, and admits he himself always thought at this time that Joseph did want to make some investment [O'Donnell, Tr. 1644, 1649].

Now Joseph once again set up another meeting for O'Donnell so that the deal should not lag. On November 29, 1952, Joseph called O'Donnell while Joseph was with Needleman, Gold, Terman and Coleman at Needleman's office [Joseph, Tr. 394]. Coleman in that call suggested O'Donnell meet with him the following week [O'Donnell, Tr. 1677]. That meeting was held, with Casey and Chinn and two of the Wymans, and the matter was reviewed again [O'Donnell, Tr. 1679; Chinn, Tr. 953-954].

(c) Later Contracts by Joseph With O'Donnell Show His Continued Interest and Intent to Participate in Kinzua.

Now, it should be remembered, O'Donnell, the West Coast lumberman, was the person to carry the Kinzua deal forward for himself and Joseph. This is the pattern that events took; but it is interesting to note that O'Donnell, for all his half-denials of the existence of a joint venture, kept calling and remaining in some kind of contact with Joseph. Joseph, on the other hand, certainly did all that could be expected of him in remaining in contact with O'Donnell.

Thus, on December 5, 1952, O'Donnell admittedly called Joseph in Chicago and told him he'd been in Portland on the Kinzua transaction [O'Donnell, Tr. 1681].

On December 10, 1952 [Ex. 39], Joseph wired O'Donnell stating he'd called again today, learned he was in Portland, would be back the next day, and asked him to call. On the 11th, O'Donnell did call [Ex. 40], with information about the possible bank loans from the Seattle and Portland and other banks [Joseph, Tr. 405]. It "was something for him to use as ammunition to raise some money" [O'Donnell, Tr. 1743].

Around December 5 to 10, 1952, Dunn called Joseph at O'Donnell's behest and gave him requested information regarding Kinzua and the proposed acquisition plan [Dunn, Tr. 1010-1026]. Dunn well understood that Joseph was to try to interest Chicago investors and perhaps to participate himself [Dunn, Tr. 1066]. Around December 16, 1952, Joseph wired Terman to have Needleman send ten Kinzua brochures [Ex. 41].

On December 19, 1952, O'Donnell and Joseph spoke again by telephone [O'Donnell, Tr. 1784-1785]. Accord-

ing to O'Donnell, he then said he was getting out of the Kinzua deal; Joseph says only that O'Donnell said Kesterson was not enthusiastic and that "we ought to let the matter rest for a period of about sixty days" [Joseph, Tr. 436]. Joseph wrote a memo on December 22 concerning this call [Ex. 386].

Joseph displayed continued interest. He at once called Coleman to find out what had happened [Joseph, Tr. 439], and spoke again to him around December 26 [Joseph, Tr. 442; Ex. 393]. He got Coleman's okay to "take this up with A. C. Allyn & Company" [Joseph, Tr. 444]. He also wanted to check the Kinzua lumber, so ordered a carload of it through Coleman [Joseph, Tr. 447; Ex. 45].

He then talked to Allyn and showed him a Kinzua brochure and the prospectus he had prepared. Allyn promised to check the matter out to see if they'd be interested in looking at the deal [Joseph, Tr. 450; Allyn, Tr. 2871-2874]. (Incidentally, Allyn denied that Joseph spoke to him to have Joseph be part of any Allyn "group" in the deal [Allyn, Tr. 2874].)

January 5, 1953, Joseph was in contact again with O'Donnell, who called about Marshall's interest on behalf of A. C. Allyn [Joseph, Tr. 452].

Later there was another call between Joseph and O'Donnell in Los Angeles, during January [Joseph, Tr. 453].

And on February 26, 1953, O'Donnell called Joseph from Palm Springs stating that he was to meet Coleman and talk further about Kinzua [Joseph, Tr. 453-454; O'Donnell, Tr. 1821-1824]. (O'Donnell's admission of the making of this call was grudging, but unmistakable.)

O'Donnell, according to Joseph, spoke of a management fee for himself [Joseph, Tr. 456].

Encouraged by this call, Joseph now sat down and wrote a letter of February 27, 1953 [Ex. 52], expressing pleasure that O'Donnell felt better and had discussed this operation on the phone.

He also wrote to Terman on the same day [Ex. 122], discussing the O'Donnell call and the discussion of O'Donnell's management of the deal, and the proposed Coleman conference. This contemporary letter to Terman speaks volumes as to the absolute truth of Joseph's consistent contention that O'Donnell then actively discussed management with him and asked him, as equal to equal, whether he would be amenable to O'Donnell's having a management fee.

On March 3, 1953, Joseph wrote again to Terman and told him of Allyn contacts [Ex. 55].

Once again, on March 31, 1953, O'Donnell and Joseph spoke on the telephone. Even on O'Donnell's own version, he said: ". . . we were going to go ahead and look the thing over" [O'Donnell, Tr. 1841]. He urges that Joseph told him to "do your business with Marshall" [O'Donnell, Tr. 1841]. O'Donnell does *not* claim he stated that he had completed investigations; he does *not* claim Joseph stated he would be out of the deal if Marshall and Allyn weren't interested. Even on O'Donnell's version of the call, the necessity for checking back with Joseph when he had gone ahead and looked the deal over is apparent. Joseph, of course, much more credibly states that O'Donnell told him he would check back after getting a cruise and a report on that cruise [Joseph, Tr. 464-466].

Admittedly, the cruise had not been made at the time of this call and was not made until at least June [O'Donnell, Tr. 1570; Findings of Fact XI(1), Tr. 268]. Balance sheets of Kinzua had not been provided yet either, and were not provided until April 21, 1953, by O'Donnell's own testimony [O'Donnell, Tr. 1853]. Joseph's continuing activity and interest and the need for further checking after March 31, 1953, stands admitted by O'Donnell. How then could the conclusion of the court [Conclusions of Law VIII, Tr. 281] that the relationship was terminated by March 31, 1953, or that defendant O'Donnell at least had reason to believe it ceased to exist—how then can such a conclusion and a judgment resting thereon be supported? The answer is that it cannot possibly be supported and is plainly erroneous.

It was O'Donnell's plain duty to get back to Joseph after March 31, 1953, and give him the opportunity to put up the money which he had raised in Chicago. The argument of respondents must basically be that Joseph should, after this conversation, have continued to initiate calls to O'Donnell, and that failing this it served him right that he was shut out of the deal is no argument at all—it amounts simply to saying that Joseph was too honest, believed that O'Donnell would go through with the joint venture agreement to purchase Kinzua with Joseph, and consequently was an easy mark who deserved to be cheated. Such an argument pushes every principle of fair dealing and fiduciary to one side and renders them of no account.

(d) Joseph Undeniedly Raised, and Still Has Available, All the Financing Required to Fulfill His Portion of the Agreement to Purchase Kinzua.

Harry Joseph on his part undeniedly secured adequate financing for his portion of the Kinzua deal. He got out his Kinzua prospectus [Ex. 383] from information obtained at Portland earlier, and from the Dunn call in December. He secured Kinzua brochures, made necessary amendments in his prospectus [Ex. 393] and, working from these documents and his own excellent reputation and acquaintanceship with friendship with prominent and wealthy Chicago businessmen, went out and secured all necessary financing, some previous to and some following the November meetings with Chinn, O'Donnell and Coleman.

Joseph was prepared to invest $250,000 personally, and the same through Joseph Lumber Company [Joseph, Tr. 483, 695]. Harris Perlstein, President of Pabst Blue Ribbon Beer, agreed to invest $250,000 in the Kinzua deal [Joseph, Tr. 354-355]. Perlstein himself testified to this effect on deposition [Perlstein, Tr. 4198-4200] and to his own ability to make such an investment, his confidence in Joseph, and his knowing him quite well for thirty to forty years.

Isadore Brown, a Master in Chancery in Chicago, agreed to invest $250,000 [Joseph, Tr. 2359-2361]. Joseph had known Isadore Brown for thirty years and had real estate transactions with him [Joseph, Tr. 2361].

Milton A. Morris, a substantial corporate executive and real estate investor [Morris, Tr. 4171], testified that he had known Harry Joseph for thirty years, in a close social and business association, and that in June and November of 1952 he discussed Kinzua with Joseph

[Morris, Tr. 4172]. He agreed to participate in the Kinzua investment to the extent of $250,000 [Morris, Tr. 4173].

Henry Russell Platt, a former vice-president of the Continental Illinois National Bank and Trust Company of Chicago, the sixth or seventh largest bank in the country [Platt, Tr. 4206-4207], discussed Kinzua with Joseph and agreed to invest $250,000, or what was necessary [Platt, Tr. 4214]. Platt would have relied on Joseph [Platt, Tr. 4217], and stated he could additionally raise a very substantial portion of Joseph's requirements on the deal [Platt, Tr. 4215].

Abraham Pritzker, an attorney in Chicago and a member of the firm of Pritzker, Pritzker & Clinton, attorneys for plaintiff in this case [Joseph, Tr. 2346], discussed Kinzua with Joseph about two weeks before the Portland meeting of November 18 and 19, 1952 [Joseph, Tr. 2347]. Pritzker told Joseph that if it looked good to Joesph, Joseph could count on Pritzker for an investment of a million dollars or possibly more [Joseph, Tr. 2346]. Joseph had known Abe Pritzker's father and him for thirty-five years [Joseph, Tr. 2348].

William J. Lancaster, a Chicago attorney knows Joseph well for twenty or more years [Lancaster, Tr. 4228-4229] and had made a number of investments with Joseph [Lancaster, Tr. 4231-4232], discussed Kinzua with Joseph in the latter part of 1952 and made a firm commitment with Joseph to invest at least $50,000 in the venture [Lancaster, Tr. 4229-4231]. Lancaster relied on Joseph and had implicit faith in him and his integrity and business ability [Tr. 4332].

Sol A. Hoffman, a Chicago attorney who had known Joseph for at least twenty-five years [Hoffman, Tr.

1101], discussed Kinzua with Joseph in November of 1952 [Hoffman, Tr. 1101], and firmly and definitely committed himself to invest $250,000, upon the judgment of Joseph [Hoffman, Tr. 1107].

David S. Chesrow, an attorney, real estate investor and director of the Consumers National Bank of Chicago, knew Joseph for twenty to thirty years, and knew him very well [Chesrow, Tr. 1507]. In 1952 he discussed Kinzua with Joseph and agreed to invest to the extent of $250,000 [Chesrow, Tr. 1508]. Like others of the investors, he testified to having seen the prospectus which Joseph got up [Ex. 381]. He relied on Joseph's knowledge [Chesrow, Tr. 1519].

Plainly, Joseph fulfilled all his duties as to financing, and did so through responsible and honorable fellow investors who held him in high esteem.

* * *

In summary, Joseph:

(1) Admittedly located the Kinzua deal through Terman;

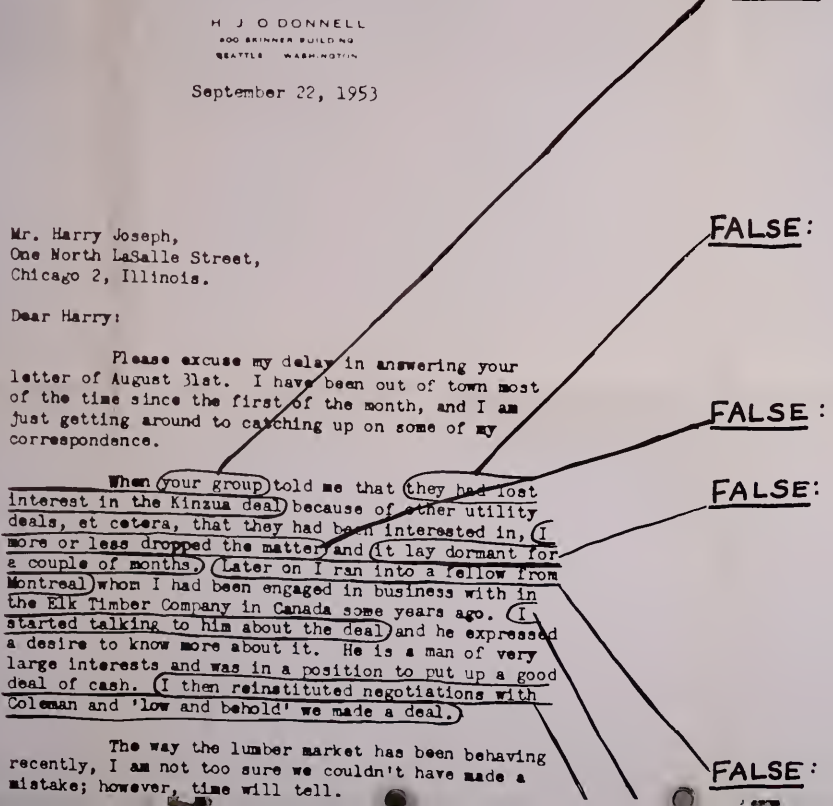
(2) Admittedly made the initial contacts with the sellers and set up the first meetings with them;

(3) Continued contact throughout on all phases with O'Donnell, and was treated by O'Donnell as an equal in the deal on such contacts;

(4) Raised all the money necessary, and more, to invest for his group's one-half of the Kinzua deal.

Joseph did everything required of him, acted at all times in accordance with the contractual arrangements he had made with O'Donnell, and is entitled to the benefit of his venture. Any findings or judgment to the contrary is clearly erroneous and unsupported by credible evidence.

O'Donnell Explains to Joseph —— FALSELY



H J O DONNELL
800 SKINNER BUILDING
SEATTLE WASHINGTON

September 22, 1953

Mr. Harry Joseph,
One North LaSalle Street,
Chicago 2, Illinois.

Dear Harry:

Please excuse my delay in answering your letter of August 31st. I have been out of town most of the time since the first of the month, and I am just getting around to catching up on some of my correspondence.

When your group told me that they had lost interest in the Kinzua deal because of other utility deals, et cetera, that they had been interested in, I more or less dropped the matter and it lay dormant for a couple of months. Later on I ran into a fellow from Montreal whom I had been engaged in business with in the Elk Timber Company in Canada some years ago. I started talking to him about the deal and he expressed a desire to know more about it. He is a man of very large interests and was in a position to put up a good deal of cash. I then reinstituted negotiations with Coleman and 'low and behold' we made a deal.

The way the lumber market has been behaving recently, I am not too sure we couldn't have made a mistake; however, time will tell.

FALSE: A.C. Allyn and Company was never Joseph's group, as proven in many ways. Allyn and Joseph so testified (Tr. 2869, 450). O'Donnell on April 21, 1953 told Marshall, Allyn's representative, that Joseph's interest was that of a "small investor" (Tr. 1853). Marshall didn't even know who Joseph was. O'Donnell reported directly to Joseph even after Marshall began to investigate the deal (Tr. 1823-5, 1841).

FALSE: O'Donnell admits that Marshall only told him A.C. Allyn was working on some other deal, and was forced to drop out for four to six weeks. (O'Donnell, Tr. 1440, 1443). O'Donnell in this very letter, asserts he held the matter in abeyance longer than "four to six weeks."

FALSE: O'Donnell himself admits under cross-examination that this was "inaccurate." (O'Donnell, Tr. 1906).

FALSE: The day after A.C. Allyn indicated on April 27, 1953 that they'd have to wait four to six weeks (O'Donnell, Tr. 1440, 1443) O'Donnell called Kelleher, representative of the wealthy defendant, Webster, and sought to bring Webster in as an investor in Kinzua (O'Donnell, Tr. 1435-7). He and Webster met on May 9, 1953, less than two weeks later, and agreed orally that Webster would take 50% of the deal. (O'Donnell, Tr. 1557). The deal never lay dormant for an instant.

FALSE: The "later on" implies falsely a previous period of laying

of the time since the first of the month, and I am just getting around to catching up on some of my correspondence.

When your group told me that they had lost interest in the Kinzua deal because of other utility deals, et cetera, that they had been interested in, I more or less dropped the matter and it lay dormant for a couple of months. Later on I ran into a fellow from Montreal whom I had been engaged in business with in the Elk Timber Company in Canada some years ago. I started talking to him about the deal and he expressed a desire to know more about it. He is a man of very large interests and was in a position to put up a good deal of cash. I then reinstituted negotiations with Coleman and 'low and behold' we made a deal.

The way the lumber market has been behaving recently, I am not too sure we couldn't have made a mistake; however, time will tell.

If we can ever be of service to your good company just let me know and I will put the sales-manager down there on your trail.

With best personal regards.

Very truly yours,

H. J. O'Donnell

HJO:ej

Exhibit 93

FALSE: O'Donnell himself admits under cross-examination that this was "inaccurate." (O'Donnell, Tr. 1906).

FALSE: The day after A.C. Allyn indicated on April 27, 1953 that they'd have to wait four to six weeks (O'Donnell, Tr. 1440, 1443), O'Donnell called Kelleher, representative of the wealthy defendant, Webster, and sought to bring Webster in as an investor in Kinzua (O'Donnell, Tr. 1435-7). He and Webster met on May 9, 1953, less than two weeks later, and agreed orally that Webster would take 50% of the deal. (O'Donnell, Tr. 1557). The deal never lay dormant for an instant.

FALSE: The "later on" implies falsely a previous period of laying dormant. Nor was there any "running into" Webster; O'Donnell admits this also is "inaccurate" (O'Donnell, Tr. 1907). O'Donnell chased Webster, and hard.

FALSE: O'Donnell himself testifies "This isn't right. I will admit that" (O'Donnell, Tr. 1908).

FALSE: Negotiations on April 27, 1953, with Coleman were never broken off. Indeed, O'Donnell himself testified he told Coleman when Allyn indicated their temporary delay that "I don't like to lose the deal.... I would like to have time to talk to some of the other people..." (O'Donnell, Tr. 1441).

VI.
A TALE OF TWO LETTERS.

Letter No. 1.

We ask this Court to consider the following striking contrast:

Letter No. 1, is from O'Donnell to Joseph, dated September 22, 1953 [Ex. 93], and discloses in its fullest flower the character and motive of O'Donnell—his duplicity, his deception, his awareness of his guilt in betraying Joseph who had brought the Kinzua deal to him in good faith for both to acquire as a joint venture.

It is reproduced with brief analysis.

Letter No. 2.

Letter No. 2, dated August 27, 1953 [Ex. 87], is from Joseph to Terman, the broker who first discovered and submitted the Kinzua deal to Joseph.

This letter discloses:

1. Joseph's spontaneous indignation upon discovering O'Donnell's treachery;

* * * * * * * * *

2. Joseph's fidelity to and his concern for Terman, who was left out in the cold by O'Donnell's maneuver;

* * * * * * * * *

3. Joseph's determination to obtain redress.

This letter was written by Joseph almost immediately after reading in "The Timberman" that the Kinzua properties had been purchased by the O'Donnell group.

It is reproduced herewith.

HARRY JOSEPH
ONE NORTH LA SALLE STREET
CHICAGO 2, ILLINOIS

August 27,
1 9 5 3

Sam Terman,
4121 Wilshire Blvd.,
LosAngeles, California

Dear Sam:

This morning my attention was called to the item appearing in the first paragraph of this trade report dated August 21st, 1953, "The Timberman".

Needless to say, I was shocked and surprised to learn this information. The last time I talked with you, you will remember, my last conversation with O'Donnell was that he was waiting for a Mr. Price, who, at one time or another, was part of the Weyerhauser & Walker interests, to come to Seattle and then go down to the mill and go over the standing timber of the Kinzua Pine Mills.

Of course, my first obligation is towards you, because of you having submitted this deal to me and then you know the rest of the story, I am sure. I do not know what you want to do about this and perhaps you know something about this deal. If you do, I would like to know, however, as for myself, I do not intend to let this matter drop. As a matter of fact, I had a talk with Sol Hoffman, who no doubt you know, and with whom I have discussed this deal, having in mind that if he felt the deal was good enough, he might even take a position in it. Of course, like the rest of my group, he asked me off and on now for some time, and I told them all the same thing, that as far as I knew, the deal was still being considered by O'Donnell and the group in Seattle and I was still waiting to hear from them.

At this writing I have not heard from O'Donnell since I last talked with him several months ago and I intend doing nothing about O'Donnell for the time being, until I hear from you.

HARRY JOSEPH
ONE NORTH LA SALLE STREET
CHICAGO 8, ILLINOIS

However, it would seem to me that your friend Needleman should have said something to you about this.

With kindest personal regards to your good wife, and hoping to hear from you soon on this matter, I am

Sincerely yours,

Harry Joseph

HJ:as

P.S. It could be, if you will note the second paragraph in this bulletin that Forest Credits Act now in effect under which national banks may make loans on managed and protected forest tracts, made this deal possible at this time.

E/ 68:E.

VII.

O'Donnell as a Witness Was so Discredited by His Own Admissions of Untruthfulness and by Documentary Evidence Contrary to His Testimony That Nothing Substantial Was Left to His Testimony Against Plaintiff, and Any Finding Purported to Be Based Thereon Is Clearly Erroneous.

O'Donnell admittedly was untruthful in his dealings and in his testimony and statements in this case very often, and under most damning circumstances. This shocking degree of admitted untruthfulness, together with the documentary evidence against other aspects of his testimony, completely incredible aspects of other portions, and admissions wrung from him by confronting him with documents, render the few remaining remnants insufficient basis to provide the slightest rational support for the trial court's findings, which are clearly erroneous.

Whether the untruths are ones like his extraordinary denials in the deposition that he ever met Joseph at all on November 18, 1952, the day before the important Coleman meeting, or others such as denying he told Joseph that the timber would be evaluated at $40.00 per thousand feet, O'Donnell's pattern is crystal clear, and so are the results. O'Donnell's pattern was one of minimizing such things as the role of, and O'Donnell's contacts with, Joseph, by every possible device, and then of backing off in a gingerly manner from untruthful blacking out of some aspect of Joseph's role when confronted with the grim and frightening reality of documents which demonstrated the O'Donnell untruthfulness. Let us briefly examine examples, and give this court some of the flavor of the untruthful character of O'Donnell's testimony—that same untruthfulness which neces-

sitated the fantastic number of *ten* single space pages of typed "changes" [Ex. 128] in O'Donnell's deposition, in a desperate attempt to bring it into some kind of approximate relationship with the demonstrable facts.

Before we do, this court's attention is earnestly invited to an examination of these "changes," contained in Exhibit 128, in evidence herein. Since the deposition of O'Donnell itself is printed *in its changed form,* it requires examination of the changes to reconstruct readily the untruths of the original deposition.

Let us turn then to an examination of a sampling of the truly remarkable untruths of defendants which can be demonstrated.

Until Forced to Admit the Truth by Overwhelming Documentary Evidence, Chinn and O'Donnell Falsely Denied That They Did Not Meet Joseph on November 18, 1952, in Portland.

Only documentary evidence forced Chinn and O'Donnell to admit the existence of their November 18, 1952, meeting with Joseph. Joseph's correct position throughout has been that he spent the entire late afternoon and evening of November 18, 1952, with O'Donnell and Chinn in Portland, Oregon, prior to the conference of the next day with Coleman, the agent for the sellers.

Chinn and O'Donnell on deposition *both,* with extraordinary parallelism, denied flatly any such meeting with Joseph. These denials are apparent in many places in the changes in the O'Donnell deposition. For example, on page 1 thereof, O'Donnell asserts "since the deposition I have recalled that we met Joseph the day before our meeting with Coleman although I had been originally under the impression that we did not meet with Joseph until the next morning."

A glance at the long list of changes in O'Donnell's deposition indicates that while he was repeatedly given the opportunity to refresh his recollection, he repeatedly denied meeting Joseph at the Heathman Hotel on November 18, 1952, registering with him, having dinner at the University Club with him, and spending the evening with him. This is evidenced by the changes to some seventeen or more questions indicated by Exhibit 128, most of them on the first three pages of such changes.

It is remarkable that Chinn and O'Donnell should both have denied remembering the November 18 meeting with Joseph. It is less remarkable that they should later, on the trial, and the changed depositions have admitted the meeting, the registration together, the dinner together at the University Club, going together to a cabaret, and Joseph's room as adjoining O'Donnell's, with Chinn being down the hall [O'Donnell, Tr. 3430-3434, 3444, 1591-1592; Chinn, Tr. 3278-3280, 3285-3287; 882-884].

Some men are born with good memory; others have memory thrust upon them; so here Chinn and O'Donnell. For they were now confronted with the November 18, 1952, Heathman Hotel Register (showing signatures of Chinn, O'Donnell and Joseph on consecutive registration slips, Nos. A-48683, A-48684 and A-48685, and showing them to have signed for room 540, 537 and 536 respectively) and other documents—and these thrust memory upon O'Donnell and Chinn [Exs. 27, 28, and 29]. It took such irrefutable things as this, and the University Club bill, to occasion the defendants' changes, and the wan admission of O'Donnell—"I can faintly remember seeing him in the lobby" [O'Donnell, Tr. 1617], and of Chinn—"I have a faint recollection that Harry Joseph was in the hotel when we got there" [Chinn, Tr. 884] (Note too the similarity, common for

Chinn and O'Donnell, of the sameness of minor detail they remember and the similarity even of the phrasing and choice of words).*

O'Donnell and Chinn, driven to it, sadly assented and backed down [Ex. 128; O'Donnell, Tr. 1620; Chinn, Tr. 986]. The fact of such meeting was now established, over their protests, by the documents.

The Incredible Twin Blackouts of Chinn and O'Donnell as to the Conversations of November 18, 1952, Are Defendants' Only Possible, Though False and Embarrassing, Second Lines of Retreat.

As above discussed, the agonizing pressure of incontrovertible rebutting documents made Chinn and O'Donnell admit they spent the evening of November 18, 1952, with Joseph. Indeed, O'Donnell even says he has "a faint recollection" of seeing Joseph "walking ahead of me into the dining room" of the University Club [O'Donnell, Tr. 1620]. But nothing more; O'Donnell's flexible and convenient memory does not even recall this as vividly as a meeting in St. Louis with Joseph many years ago, and of no particular importance [O'Donnell, Tr. 1620-1621]. Here we have the parties together all evening

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*A possible source of the collusive falseness of the testimony of Chinn and O'Donnell in this regard is the grudgingly admitted fact that Chinn and O'Donnell met the night before O'Donnell's deposition [O'Donnell, Tr. 1650], and again for lunch during the deposition (O'Donnell says, typically "I don't know whether I had lunch with him, I think maybe I might have. It's quite possible I did, yes.") [O'Donnell, Tr. 1652.]

At the trial both urged they could hardly recall what if anything they spoke of on these meetings [O'Donnell, Tr. 1650, 1652; Chinn, Tr. 893], and Chinn denied asking O'Donnell what his story was on the deposition. The sameness of their admittedly erroneous denial of the November 18 meeting is proof that this also is false, and that they plainly did discuss their stories together.

Counsel, without assigning any reason, refused on deposition to let Chinn say what had been discussed at lunch between Chinn and O'Donnell. [Tr. 3249.]

until midnight or 1 a.m. [O'Donnell, Tr. 1632], on the eve of a multi-million dollar deal such as most men never approach in their entire lives, and Chinn and O'Donnell remember nothing of the conversation whatever, they say [O'Donnell, Tr. 1622-1623; Chinn, Tr. 901-902].

The inherent incredibility of the asserted inability to recall any of the evening's conversations is conspicuously apparent. Joseph's testimony that there was an explicit agreement of joint venture stands undenied, except tangentially by O'Donnell's feeling he remembers "things that have a direct effect on my business [O'Donnell, Tr. 1655]." O'Donnell, as we show later in this section, could not "remember" many things with direct effect on his business. His testimony here is purely conclusionary in character.

The fact is that Chinn and O'Donnell here were both placed in desperately embarrassing positions. To admit vivid recall of the evening's conversations, after previously denying the existence of such an evening's meeting at all, would be inconsistent with the vagueness that they desperately needed to blur the untruthfulness of their earlier asserted forgetting of existence of the evening's meeting. Thus they are forced to the denial that they recall the evening's conversation, and are hoist by the petard of their initial false denial of the meeting itself.

The Fantastic Untruths of O'Donnell in His "Explanatory" Letter of September 23, 1953, Stand Largely Admitted or Conclusively Proved.

O'Donnell, confronted by written expression of "surprise" by Joseph [Ex. 90], that O'Donnell had entered without Joseph into the Kinzua deal, naturally had to make some response. He did, in a letter of September 22, 1953 [Ex. 93], packed with admitted and obvious falsehood. A chart appended to this brief in the preceding

section "A Tale of Two Letters," details and rebuts these, many from the mouth of O'Donnell himself.

This court may well judge O'Donnell's credibility from this letter, in which he attempts to explain to Joseph the theft of Joseph's opportunity, brought to O'Donnell by Joseph to share together. We earnestly commend to this court's attention the crushing examination of O'Donnell by plaintiff's counsel [Tr. 1897-1907], dealing with this totally false letter. The excuses, grudging admission and falsity of O'Donnell's testimony generally are all magnificently illustrated in this relatively brief portion of the transcript, which leaves O'Donnell flayed and stripped of any possible pretense of truthfulness or credibility.

We shall not here cover again all the ground covered by the appended chart, which shows at least seven of the separate falsehoods of the letter.

In brief summary, it shows that, despite the letter's grotesque assertions:

(1) A. C. Allyn & Company was *not* Joseph's group, and O'Donnell knew it;

(2) Allyn did *not* drop out of the deal, as O'Donnell well knew;

(3) O'Donnell did *not* drop the matter;

(4) The deal did *not* lay dormant for a couple of months, or at all;

(5) O'Donnell did *not* run into Webster, but instead pursued him;

(6) O'Donnell did not just happen to start talking about the deal to Webster, but carefully arranged such talks and presentations;

(7) O'Donnell never broke off negotiations with Coleman, but instead used immediate earnest effort to keep them going.

Indeed, the chart does not include all the untruths which O'Donnell's letter contained. For example, O'Donnell asserts in his reply that he had been out of town most of the time since receiving the letter, written over three weeks before his reply. In actuality, his testimony was that during his general period he was "quite a bit at Kinzua," and "in working with Mr. Dunn a great deal in Seattle" [O'Donnell, Tr. 1897]. His trips to Kinzua were usually three or four days [O'Donnell, Tr. 1897]. He was not prepared to say that he ever stayed at Kinzua more than three or four days [O'Donnell, Tr. 1897-1898]; he was at Kinzua or Seattle most of the time.

We think once again the inference is clear that the reason the answer was so late was not that he was out of town most of the time (O'Donnell estimates he read the Joseph letter "a few days" after arrival [O'Donnell, Tr. 1898]), but simply that this was a terribly difficult letter for him to compose in somehow trying to pacify the surprise and justified anger of Joseph.

One comment is of importance to this court in regard to O'Donnell's lame explanations of the untruthful statements in the letter—"It was what I thought at the time. I really didn't stop to think about it . . . I wrote this thing out without thinking too much about it" [O'Donnell, Tr. 1899]. And again: "I tell you that I just carelessly wrote that letter, and that is all. I wasn't trying to fool him or anything" [O'Donnell, Tr. 1909]. And so on; and on.

Let the court be apprised that around this time this sequence of events, falsely related in O'Donnell's letter, was far from vague in O'Donnell's mind. When he received Joseph's letter, O'Donnell was in the middle of a hot dispute with Kelleher, to whom he was determined to avoid paying a commission.

For example, he told Kelleher, as he himself states, that if he insisted on a commission, "we are out of business" [O'Donnell, Tr. 1539]—*i.e.,* that O'Donnell would withdraw from the deal. This dispute went on during July, August and September of 1953—the same period as the Joseph-O'Donnell exchange of letters.

Now, as one portion of his effort to collect a commission, Kelleher sent, on August 20, 1953, a letter to O'Donnell [Ex. 84], carefully outlining in four single spaced typed pages the efforts of O'Donnell to reach Webster through Kelleher on April 28, 1953, and the Webster transaction. This letter was written only eleven days earlier than Joseph's own letter, and the course of events had therefore been most recently reviewed by O'Donnell when he wrote his completely untruthful letter to Joseph on September 22, 1953. The possibility of inadvertence or genuine forgetfulness, already microscopic, vanishes entirely.

At any rate, O'Donnell's credibility is further destroyed by his weaving of this letter's whole thin and shabby tissue of lies. We submit that this is truly a case wherein the rule of the *United States Gypsum* case is applicable, as stated in *Orvis v. Higgins* (C. C. A. 2), 180 F. 2d 537, cert. den. 340 U. S. 810. That rule is that if the evidence is partly oral and the rest is written or deals with undisputed facts, then the appellate court can ignore the trial judge's finding and substitute its own, ". . . if the written evidence or some undisputed fact renders the credibility of the oral testimony (NOTE: in support of the finding) extremely doubtful."

This of course is precisely our situation. Defendants must take such sorry comfort as they can from the credibility of O'Donnell, and O'Donnell's testimony has been rendered, as a great understatement, "extremely doubtful." It is so untruthful and demonstrably incred-

ible that the judgment and findings are plainly erroneous and subject to the review and reversal of this court.

The sly misstatements of O'Donnell are numerous and obvious despite the intensity of O'Donnell's efforts at concealment. We cannot cite all, but will give a few.

Outside Documentary Evidence Belies O'Donnell's Denial He Gave Joseph Information as to the Value of the Timber.

Joseph in his prospectus as to the Chicago investors included the information that the timber could be sold for $40.00 [Ex. 381]. O'Donnell denies saying it could be thus sold [O'Donnell, Tr. 1725], saying he said only it *might* be *appraised* somewhere around that figure. (Clearly, O'Donnell at trial wanted to make it seem that the profit would be small, and that he had given Joseph little information which in any case Joseph misinterpreted.)

However, O'Donnell is caught up by outside documentary proof that he was thus representing the timber. For in two Kelleher memoranda, necessarily prepared by Kelleher on the basis of O'Donnell's information, we again find the same price stated *as the sales price* [Exs. 65 and 66]. Plainly O'Donnell is guilty once again of untruthfulness in denying he would state the timber could be sold at $40.00 per thousand; he told it to Kelleher also, whom Joseph did not even know.

Only Under Pressure Did O'Donnell Admit, After His Contrary Testimony, That He Had Put No Additional Monies Into Kinzua for Improvements.

Typically, O'Donnell testified he had put up additional monies for improvements on Kinzua [O'Donnell, Tr. 1920], and that the total of expenses for improvements came to somewhere around $800,000. Asked pointblank to produce checks of his or his group purporting to be

further advances to Kinzua since acquisition on August 17, 1953, he did not do so.

Instead, counsel for defendants, beating as discreet a retreat as possible from O'Donnell's position, made a statement they admitted ". . . might not be clear from the testimony of the witness" [O'Donnell, Tr. 1933]. That statement was, in essence, that the funds for improvements and betterments of Kinzua did *not* come from further advances of the buyers, as O'Donnell had earlier urged, and that there were *no* contributions from outside funds for those purposes [O'Donnell, Tr. 1933-1934].

Once again, the threatening pressure of documentation drove O'Donnell grudgingly and reluctantly toward the truth.

Concealment of the Interview With Honorable William J. Lindberg, United States District Court Judge Who Testified at the Trial.

As is disclosed by the testimony [O'Donnell, Tr. 1739-1740], O'Donnell in his answer to a pretrial interrogatory did not include Honorable William J. Lindberg, United States District Judge, who testified at the trial on his behalf, as a person whose deposition had not been taken but whom he had talked with about the lawsuit. When it finally became apparent from remarks of counsel that Judge Lindberg would be called to the stand, counsel for plaintiff asked whether O'Donnell had spoken to him about the case. O'Donnell actually started once again to deny it [O'Donnell, Tr. 1739], but then admitted that he had and urged that he "just didn't think about it when he answered his interrogatories" [O'Donnell, Tr. 1739].

Incidentally, Judge Lindberg, called to the stand as defendant's witness, testified in substance that he and O'Donnell were good personal friends [Lindberg, Tr. 1856], and that he had been at the November 6, 1952,

meeting of Terman, Chinn and O'Donnell, but could recall substantially nothing of that conversation [Lindberg, Tr. 1861-1862], except that toward the end of the stay there were some remarks as to apartment houses in Los Angeles, and that the conversation "could have been of a business character" [Tr. 1856].

In substance this testimony of Judge Lindberg does little more than confirm and corroborate that Terman was invited up to the suite by Chinn, and that ". . . he talked primarily . . . to Mr. O'Donnell and Mr. Chinn" [Lindberg, Tr. 1861].

O'Donnell, Time After Time, "Fails to Recall" (at Least Until After Confrontation With Documentary Proof) Important Contacts With Joseph.

O'Donnell plainly (and ultimately to a large extent admittedly) conversed by telephone with Joseph on November 26, 1952, November 29, 1952, and February 26, 1953. Yet (in protection of his position that there was little contact with Joseph), he "failed to recall" such conversations until again the proof required it of him.

He continued to deny the November 26, 1952, conversation with Joseph about Kinzua, even *after* proof [O'Donnell, Tr. 1932]. Joseph testified there was such a call while he was at La Quinta [Tr. 389-390]. Morris so testified [Morris, Tr. 4174]. Exhibit 34, a hotel bill, provides further documentary evidence of the making of a long-distance call. Under these circumstances, the existence of such a call is clear; yet O'Donnell would not admit it.

As to the November 29, 1952, call, this took place from the office of Joe Coleman, and was of importance, since it admittedly resulted in the arrangement of a meeting in Portland by O'Donnell with Coleman and the Wymans and Chinn [O'Donnell, Tr. 1674-1676].

O'Donnell on deposition denied that he talked to Joseph in this call at all [O'Donnell, Tr. 3460-3461], although

in point of fact it was Joseph who took a leading role in the call [Joseph, Tr. 395] at a meeting in Gold and Needleman's office, with Coleman and Terman also present [Joseph, Tr. 394; Ex. 365]. Joseph put in the call [Gold, Tr. 2967], after suggesting that O'Donnell should be reached and a further meeting set up [Joseph, Tr. 395; Terman, Tr. 1244].

On trial, O'Donnell finally grudgingly admitted that on this occasion he "apparently" spoke to Joseph, "because I believe Mr. Coleman said so in his deposition" [O'Donnell, Tr. 1673]. The evidence had become too overwhelming, and the admission had to be made. This sort of thing is very characteristic of the testimony of O'Donnell.

(Indeed, such O'Donnell untruths about telephone calls are not confined to his calls with Joseph. O'Donnell on another occasion, as part of his effort to attempt to squeeze someone else, Kelleher, out of any claim in the deal, sent him a wire asserting: "As you know, I tried to locate Howard (NOTE: Webster) directly before I called you" [Ex. 74]. Yet, O'Donnell's testimony on trial was that he did not put in any call to Mr. Webster, and did not know where to call him; he called Kelleher and reached him in New York [O'Donnell, Tr. 1436]. So the wire contained a flat untruth, by O'Donnell's own testimony. Plainly, in the Kelleher situation, as in the present far more serious one for him, O'Donnell was willing to and did tell untruths in efforts to escape legal responsibility for his actions.)

* * *

Only limitations of space and the patience of this court prevents the doubling or the tripling of this list of the demonstrable untruths of O'Donnell. But these limitations too must be respected, and so we will mention only a few matters showing the guilty awareness of O'Donnell.

The Evasiveness of O'Donnell as an Oral Witness Was Constant and Extraordinary.

O'Donnell would not give straight answers. We submit that his was not the tongue of the verbally clumsy woodsman, as suggested by the trial court [Tr. 4249]. Rather, his were the words of the suspicious, fearful, cagy defendant with a great deal to hide and a great deal of determination somehow to achieve that hiding.

We mention a few of the numerous evasions.

As one example, consider his response when asked whether he told Joseph the company had a contract for 94,000,000 feet of pine. Captiously, he criticized the prospectus statement to this effect, repeating with less vigor the criticism that it must have been 80 to 90 million, rather than 94,000,000 [O'Donnell, Tr. 1746]. He did not recall giving anyone else the same figure; but after being confronted with Exhibit 644, a letter from Mr. Maxwell of Georgia-Pacific to another Georgia-Pacific executive, stating that O'Donnell had given him that figure, O'Donnell was again asked whether he had in fact given Maxwell that figure. He finally replied that it was "quite possible," and went on to admit he might have told Joseph the 94,000,000 figure also [O'Donnell, Tr. 1750].

Similarly, O'Donnell testified he called Maxwell to tell him he had become "reinterested" in Kinzua [O'Donnell, Tr. 1946]. Yet, asked if he would have called if not reinterested, balked some six times at answering [O'Donnell, Tr. 1987-1989], providing such circumlocutions as: "I was re-interested in taking a look to find out whether I would become interested in it" [O'Donnell, Tr. 1988]. Even the simple questions were answered with such remarkable caution as this.

O'Donnell's Evasiveness With Written Evidence.

An example of O'Donnell's evasiveness with regard to written evidence is his failure to produce two important wires to and from Kelleher [Exs. 72 and 74]. The parties stipulated that they should produce all documents in their control or counsel's possession, which might lead to the discovery of admissible evidence [Pretrial Order, Tr. 230]. Nonetheless, on deposition O'Donnell did not produce these telegrams, though he testified at the deposition that he had produced every document in his possession or control [O'Donnell, Tr. 3667].

On trial, O'Donnell said he never kept any of the Kelleher telegrams, but simply threw them all in the wastepaper baskets [O'Donnell, Tr. 1542]. He said in response to a question about correspondence between Kelleher and him that Kelleher "sent me several telegrams," and finally admitted sending one wire to him [O'Donnell, Tr. 1542, 1545], saying he would stop negotiations if Kelleher demanded a commission. Then he said later he might have the wires at home or at his office [O'Donnell, Tr. 1547]. He admitted he never looked for them, said he might still have them, that he "would have to look to find out" [O'Donnell, Tr. 1546-1547].

What is interesting is the failure of O'Donnell to obey either the stipulation or subpoena, and the fact that Exhibit 74 was the wire in which, as above related, O'Donnell flatly lied to Kelleher in telling him he had tried to reach Webster directly before calling Kelleher. This untruth is important, since it shows further O'Donnell's willingness to avoid the truth. And the admitted failure to produce or even look for the incriminating documents despite stipulation and subpoena further demonstrates the calculated evasion practiced by O'Donnell upon the court.

* * *

We think that the cited and typical instances of O'Donnell's untruths and evasions on important matters, many admitted under heavy documentary pressure, and all apparent, explode and wipe out the credibility of O'Donnell as a witness. Insofar as O'Donnell's testimony is necessarily relied upon to support the findings or the judgment, such findings are plainly open to independent review and to being overturned by this court.

VIII.

The Conclusion That O'Donnell and His Group Waited for Many Months Before Becoming Serious About the Kinzua Purchase Is Totally Unsupported; the Evidence Is Conclusive That O'Donnell Worked Hard From the Beginning to Complete the Kinzua Purchase.

A subsidiary but important—and completely erroneous—basis of the court's decision is that O'Donnell and his group were really not serious about purchasing Kinzua at all for some five months after Harry Joseph and Terman told O'Donnell and Chinn about Kinzua, and after Joseph took Chinn and O'Donnell up to the meeting he arranged with Coleman in Seattle. The thesis that if O'Donnell did not plan to buy Kinzua, he did not agree to buy it with Joseph, falls to the ground when we see how desperately O'Donnell fought for Kinzua throughout.

Defendants, and the court's findings, would have us believe—fantastically—that the early activity of O'Donnell and other defendants in November and December of 1952 was of a purely tentative character; that on December 19, 1952, such action ceased and the intention of O'Donnell for his group was to forget the deal entirely; and that only in April, 1953, or later, did any real intention of purchase materialize on the part of O'Donnell and his group, and only then did they move forward to purchase Kinzua.

Thus, the findings state that as of December 19, 1952, "O'Donnell determined not to pursue the Kinzua matter," [Findings VII(2), Tr. 257] and that his "determination . . . was definite and complete . . . and . . . made in good faith." [Findings VII(3), Tr. 258.] While the findings do then go on to recount a number of activities of O'Donnell and others relating to the Kinzua purchase, they assert that it was only during the latter part of March, 1953 that O'Donnell decided to "actively" investigate the feasibility of Kinzua's purchase [Findings IX(4), Tr. 263], and that it was shortly *after* that that Stuchell, the three Wymans and O'Donnell indicated their *possible* interest in each investing $500,000 in Kinzua's purchase [Findings IX(4), Tr. 263].

All these cited conclusionary findings are in themselves clearly wrong, and are inconsistent even with many others of the more factual findings themselves. The findings, and the undisputed evidence, show that the deal was worked out by O'Donnell and his group in and around November and December, 1952, and constantly and persistently pushed forward to completion.

Let us examine and evaluate, to show how unfounded these conclusionary findings are, which would in effect have us believe that nothing serious was done by O'Donnell until around or after the end of March, 1953.

For one thing, the basic method of acquiring Kinzua, with its tax saving aspects, had been worked out in its essence by Dunn even before a conversation with Joseph between December 5 and 10, 1952. Dunn plainly says so himself [Dunn, Tr. 1010, 1026 and 1030]. In his conversation with Joseph he transmitted this information to Joseph, who put it into his prospectus of that period [Ex. 381]. Dunn and O'Donnell both admit that this information was for the most part correctly stated in Joseph's prospectus [Dunn, Tr. 1712-1718; O'Donnell,

Tr. 1710-1711]. So it must necessarily have been worked out then. Is this a mark of early lack of interest, effort, planning or activity? On the contrary.

Similarly, the planning for financing was started early and earnestly. The findings themselves admit that on or about November 26, 1952, only a week after the Portland meeting of Chinn, Joseph and O'Donnell with Coleman, O'Donnell and Chinn, together with O'Donnell's attorney and accountant, met with O'Donnell's bankers on the deal, and Kinzua's Portland bank was then contacted [Findings VI(1), Tr. 254].

On December 9, 1952, as conceded by the findings [Findings VI(4), Tr. 255], O'Donnell and his bankers, lawyer and accountant met with Kinzua's bankers to seek more information and convince them that O'Donnell's group was responsible and had sufficient resources to handle Kinzua's purchase and operate its properties [Findings VI(4), Tr. 255].

The findings admit at this same place that defendants Wyman, as early as December 9, 1952, were in the deal and were to invest.

O'Donnell conferred with Coleman on the following day, December 10, 1952, and made arrangements to visit and inspect the Kinzua properties [Findings VI(4), Tr. 255-256].

On December 15 through 17, 1952, O'Donnell and D. E. Wyman, with one other potential investor, visited and inspected Kinzua, inspecting its sawmill and factory operations and a portion of the timber [Findings VII(1), Tr. 256]. This was quick and energetic progress with their efforts in purchasing Kinzua.

Winter weather prevented inspection of the main part of the timber at this time [Findings VII(1), Tr. 256]. O'Donnell, not giving up any of his interest, settled

down, as far as further physical inspection was concerned, to wait for spring for a final check on the timber. He knew that nothing could be done by way of timber checking until spring. O'Donnell himself admits that on the first trip not enough of the timber could be seen to form a final opinion, but stated there hadn't been any misrepresentation by Coleman of the Kinzua timber [O'Donnell, Tr. 1773-1774].

When O'Donnell returned to his home in Seattle following the inspection of the Kinzua property, his wife felt ill and he was up with her most of the night of December 18, 1952 [Findings VII(2), Tr. 257]. Because of this, and one investor's decision not to participate in Kinzua in investment or operation, supposedly O'Donnell decided not to pursue Kinzua [Findings VII(2), Tr. 257; O'Donnell, Tr. 1784-1785].

But in reality O'Donnell never even wavered in his iron determination to buy Kinzua.* We will see that from the efforts made with regard to Kinzua only a

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*Almost like the commentary of the chorus in Greek classical drama is the conversation of attorney George Gold (lawyer for a large Kinzua stockholder) and John Casey (Kinzua attorney), on December 23, 1952, shortly after the pretended O'Donnell drop-out. [Ex. 43.]

Their view as to O'Donnell's lack of genuineness in asserting he would drop out, and as to his failure to keep Joseph, the originator of the deal, informed, is most illuminating.

Gold comments (p. 2) ". . . the reasons given to Joseph just didn't seem to be logical or hold any water at all."

". . . *what O'Donnell said,* asking for liberty to suggest a deal to somebody else, *does suggest perhaps a back-door approach of acquisition, shaking Joseph out.*" (Emphasis added.)

". . . apparently he's the one who was originally interested. How he got O'Donnell in I don't know."

Casey, discussing a failure to keep Joseph informed, while the deal was very hot, says, ". . . it seemed to me a little strange that Joseph didn't know, when he was the originator of the whole situation, because at that time we were having almost daily conferences with their counsel." (P. 3.)

few days later. And the extraordinary flimsiness of even the temporary excuse of Mrs. O'Donnell's illness will now be shown from the testimony of defendant's own witness.

The testimony of Dr. Thomas H. Holmes, conclusively refutes the possibility that any worsening illness of Mrs. O'Donnell, around December 18, 1952, could have been an important or long-continued factor in any supposed loss of interest by O'Donnell in the Kinzua purchase.

Dr. Holmes, called by defendants, testified that he was the physician of Mrs. O'Donnell and a qualified psychiatrist [Tr. 1967-1968]. While she had earlier had migraine headaches and depression and anxiety states [Tr. 1968], she improved during September, October and November of 1952 [Tr. 1972]. A major social engagement was planned for December 21, 1952 by her [Tr. 1973]. This was a severe test and again made her depressed and anxious before the party [Tr. 1973-1974]; but she was able to give the party and there was a "very dramatic change for the better" [Holmes, Tr. 1974] following that party, and a steady progressive improvement after that time.

Since she was able to give this party, and was seen on December 24, 1952 by the physician, and found to be dramatically improved [Tr. 1973-1974], she could have been seriously ill at most for two of three days after her unfortunate relapse of the 18th of December under the strain of her gay party preparations. There does not appear to have been any relapse thereafter; only the "dramatic change for the better" [Holmes, Tr. 1974], and "steady, progressive improvement." [Holmes, Tr. 1975.]

Plainly, if O'Donnell had not previously regarded the years of his wife's illness as a barrier to his going into the business deal with Kinzua, surely the few days of

illness during the expectable tension attendant on the planned party for her godchild, followed by such great and happy improvement, could not have been a serious adverse factor in any decision regarding purchase of Kinzua.

Attorney Dunn, according to his own testimony and time sheets, did legal work on the Kinzua deal on December 23, 1952 [Dunn, Tr. 1020], just four days after the alleged drop-out intention of O'Donnell.

Activity went on continuingly. Thus, on December 31, O'Donnell got a call in Seattle from Mack Marshall in Spokane wanting to discuss Kinzua [O'Donnell, Tr. 1803], and stating that according to the Chicago office of A. C. Allyn & Company Harry Joseph had brought this deal on Kinzua in [O'Donnell, Tr. 1804]. O'Donnell gave Marshall the information on Kinzua as an opportunity to buy timber at big-tract prices and get it into individual hands and sell it on short-term prices [O'Donnell, Tr. 1806].

Then, in late December, 1952, or around January 1, 1953, O'Donnell was talking with the Wymans about Kinzua, and they thought they would each put in a half million dollars [O'Donnell, Tr. 1419-1420]. Thus, O'Donnell's financing arrangements continued, less than two weeks after the alleged "drop-out" of O'Donnell—a drop-out which did not keep the lawyer from working on the deal, and did not keep the members of O'Donnell's group from sitting around and talking about the deal and from offering to put up a million and a half, or O'Donnell himself from saying he would put up one-half million [O'Donnell, Tr. 1419].

Only a few days after this, O'Donnell spoke to Marshall himself and told him he wasn't considering the purchase right then, but might feel better about it when he returned from Palm Springs [O'Donnell, Tr. 1808].

O'Donnell also discussed with Marshall the question of getting somebody in the timber to look at it later on [O'Donnell, Tr. 1808], and stated he would call Marshall if the timber looked all right and if O'Donnell was "*still* interested." (Emphasis added.) [O'Donnell, Tr. 1808.]

Marshall in adding significant details of this conversation makes clear the real reason why O'Donnell wanted to wait for a time before completing the purchase. O'Donnell told him the sellers claimed to have so many million feet of pine, but ". . . that the damn thing was all snowed in, and he didn't know what we could do; that we would have to wait . . ." and added that he couldn't "get in to see the timber." [Marshall, Tr. 3352]. The waiting was primarily until someone could look at the timber; "Harry told me that there was so much snow over there that nobody knew what they had." [Marshall, Tr. 3353.]

Concerning this conversation, O'Donnell told Dunn that the possible Allyn contribution seemed encouraging; and that he couldn't look at the timber because of snow anyway, "but that he might well revive his interest in the Spring." [Dunn, Tr. 1034-1035.]

Admittedy only pretending disinterest to Coleman, O'Donnell asked him if he'd talk to another concern, Georgia-Pacific. O'Donnell thought there was a good chance to raise the rest of the money, "but Joe Coleman I told that I was a little lukewarm . . . I was going to Palm Springs to forget about it." [O'Donnell, Tr. 1817.]

O'Donnell testified that, around January 5, 1953, while he denied a definite agreement with Joseph, he said: "We would see what we could raise and what he could raise, and when it looked like the money was available, the thing would be adjusted." The O'Donnell group and

the Joseph group would each raise as much money as it could, and then get together and allocate [O'Donnell, Tr. 1732].

The important thing for O'Donnell now was to be able to look at the timber, which couldn't be done during the winter because of the snow. So therefore O'Donnell went calmly to Palm Springs; but nonetheless drove ahead on those portions of the deal as to which action was possible. For one thing, his associate David Wyman, in late January or February, 1953, introduced Dunn to Price, the timber expert, and suggested that Price be sent down to look at Kinzua [Dunn, Tr. 1035].

Early in February, 1953, O'Donnell, after previous arrangement with Joe Coleman, talked to Carl Coleman, another authorized seller, and Joe's brother, in Shadow Mountain near Palm Springs. Carl told O'Donnell his brother Joe "will be along pretty soon." [O'Donnell, Tr. 1818-1819.] Carl said the Wymans would probably like to see Joe [O'Donnell, Tr. 1819-1821].

On February 27, 1953, this important meeting between buyer and seller was held. O'Donnell met Joe Coleman at the Thunderbird Golf Club just outside of Palm Springs, with Carl Coleman, Mike Coleman and defendant Wyman, Senior [O'Donnell, Tr. 1827-1828]. Wyman said ". . . they would like to get someone in to look at the timber." [O'Donnell, Tr. 1830.] Coleman said when it looked like someone could get in, he would let O'Donnell know. The properties were not then accessible for viewing and there was still snow on the ground [O'Donnell, Tr. 1832].

On March 18, 1953, Joe Coleman, following up the arrangement, in fact called O'Donnell in Palm Springs and told him that in about a week a man could get in and get a pretty good look at the timber. O'Donnell told

Coleman that the Wymans had a man down in California they were going to have stop there [O'Donnell, Tr. 1835].

The usual vagueness of O'Donnell here as to the conversation can be filled out by the notations in the daybook of John T. Casey, Kinzua attorney, for March 18, 1953 [Ex. 424]. His memorandum in this regard is:

> "Extended conference via long distance with Joe Coleman at Seaside, in re long distance conference with Carl and Mike in re conditions in woods and ability of timbermen to get over the same, and in re long distance conference of March 18, 1953, with Harry O'Donnell at Palm Desert, and extreme interest of these prospective purchasers."

Then O'Donnell called Wyman, and Wyman arranged to have Price inspect the timber [O'Donnell, Tr. 1835-1836]. Following his two or three day inspection, Price made his report to O'Donnell [O'Donnell, Tr. 1836-1837] at the end of March. O'Donnell called Marshall and Joseph, and discussed the report and map with the three Wymans and Stuchell [O'Donnell, Tr. 1837-1838].

In the call to Marshall, an appointment was made by O'Donnell to meet Marshall at Kinzua around April 9, 1953 [O'Donnell, Tr. 1840]. It later developed that Marshall could not go, but Stuchell and O'Donnell went nonetheless and looked at the timber with the Kinzua logging manager [O'Donnell, Tr. 1840, 1844-1845].

Even before the April 9 trip by O'Donnell and Stuchell to Kinzua, Dunn's timesheets and his testimony show he was spending time once more on the Kinzua deal [Dunn, Tr. 1036].

* * * * * * * *

From the foregoing mass of evidence and much more which could be adduced, it is clear that at no time did O'Donnell's active driving interest in and pursuit of the Kinzua deal ever fail.

IX.

The Defense of Laches, Estoppel, and Speculative Delay Are Completely Inapplicable Where the Elements of These Affirmative Defenses Are Lacking in the Record, and Especially Under the Circumstances of This Case.

To find, as the trial court purported to do [Findings XIV-XVI, Tr. 276-280; Conclusion of Law IX, Tr. 283], that Joseph is barred by laches, estoppel, or speculative delay is totally inappropriate to the circumstances of this case, and such a holding must be swept aside along with the other findings denying the existence of the fiduciary relationship and joint venture and its binding character.

On the Record on These Issues Which Is Before the Court, the Findings as to Laches, Estoppel, and Speculative Delay Are Clearly Erroneous.

The evidence which we do have, and the findings, do not support the conclusion of law or judgment relating to these defenses of laches, speculative delay or estoppel, or establish their vital elements. They speak of the purchase price of $12,250,000 [Finding XV, Tr. 277], but they do not speak of the price as being high in relation to the value of the property. Where was the harm to defendants if, as may be the case for all the record or findings show, at all times they had a property worth to them vastly more than the purchase price, and have made vast profits? (In this connection, it is worthy of note that the total down payment was later reduced from $4,800,000 to $3,345,000 [Finding XI(1), Tr. 268] and that, as defendants' counsel stipulated [Tr. 1934], any amounts thereafter spent in improvements, betterments

or other expense in Kinzua were obtained from the down payment or other funds acquired in the purchase; no more funds had to be put into Kinzua.) No injury whatever is shown to defendants.

Furthermore, the changes or efforts put forth by O'Donnell and his group in regard to Kinzua after purchase were the same as they would have been had Joseph acquired 50% instead of Webster. That is the testimony of O'Donnell himself [O'Donnell, Tr. 1991].

* * * * * * * * *

Although it turned out not to be simple securing counsel to handle this complex matter at such a distance from plaintiff in Chicago, plaintiff actually commenced with this effort at once, in accordance with his announced intention [Ex. 87].

In September of 1953 he communicated with Sol A. Hoffman, a Chicago attorney [Hoffman, Tr. 1117; Exs. 90, 93 and 95], concerning the handling of this lawsuit, but after some delay in Hoffman's office, Hoffman recommended it be sent to local counsel out West [Hoffman, Tr. 1119], as otherwise involving much travel and time away from Chicago. It was referred to Paul Ziffrin of Los Angeles [Hoffman, Tr. 1119]. After some correspondence with another attorney in Seattle, the file was sent to the office of present counsel Stanford Clinton around January or February of 1955 [Hoffman, Tr. 1117].

* * * * * * * * *

Such defenses as these, under general and Washington law (applicable by stipulation to this defense [Tr. 245]), must have their elements proved affirmatively by the party asserting them, and are not to be presumed to exist.

X.

The Legal Consequences of the Established Facts Requires Granting of Relief to Plaintiff.

If this reviewing court, as we believe it will, agrees with our thesis that on the facts defendant O'Donnell manifestly perpetrated a colossal steal upon plaintiff Joseph in elbowing him completely out of his own deal, we believe there will be no difficulty in applying the plain legal principles involved.

This is a case wherein federal jurisdiction is based on diversity of citizenship, and of course the applicable state law is to be employed on matters of substance. By agreement of the parties, as reflected in the recitals preluding the trial court's findings of fact [Findings of Fact, Tr. 245], the law of the State of Oregon governs any relationship between Joseph and O'Donnell, and the creation or termination of any such relationship. This is indicated also in the trial court's conclusions of law [Conclusion of Law, Tr. 280]. In any event, it does not appear that the Oregon law is significantly different from general law.

A brief comment on certain applicable principles and Oregon authorities will now be made. It will further demonstrate, we submit, that a judgment for plaintiff, on the astounding chicanery of defendant O'Donnell revealed by this record, was and remains the only appropriate one.

(a) A Contract of Joint Adventure May Be Implied in Part or Whole From the Conduct of the Parties.

It is the general and Oregon law that not only direct testimony as to a joint venture agreement, but also the conduct of the parties should be examined to determine whether a joint venture agreement should be implied therefrom. Thus, in *Lane v. National Insurance Agency* (1934), 148 Ore. 589, 37 P. 2d 365, the appellate court held that a contract of joint venture might be implied from

the conduct of the parties, and that this rule "permits and requires a consideration not only of the testimony directly indicating that there was such a contract, but also of the evidence which shows the course of dealing . . ." (p. 368, Pac. Rep. citation.)

This general principle is enunciated again in such cases as *Preston v. Industrial Accident Commission* (1944), 174 Ore. 553, 149 P. 2d 957, 961, and *Call v. Linn* (1924), 112 Ore. 1, 228 Pac. 127, 129.

Thus we see that the agreement here is plainly proven in two ways—directly and indirectly.

Directly, we see that Joseph's testimony as to the existence of the joint venture agreement is basically unchallenged and undenied by the incredible amnesia of both O'Donnell and Chinn, who had to admit the spending of the evening of November 18, 1952 with Joseph, but weakly claim they do not recall the events of that evening [O'Donnell, Tr. 1609; Chinn, Tr. 901].

Too, the testimony of O'Donnell himself (more fully stated in the section on existence of a joint venture) is that "Harry Joseph was to get whatever he could back east" [O'Donnell, Tr. 1813]; "I didn't have any more right to decide (NOTE: how much Joseph could get) than he had to decide" [O'Donnell, Tr. 1735]; the Chicago group was to raise ". . . (w)hatever we couldn't raise" [O'Donnell, Tr. 3555]; after raising the money, the O'Donnell group "would get together and allocate it." [O'Donnell, Tr. 3555.]

Indirectly, the entire course of dealing between the parties, as discussed in the sections relating to the conduct of O'Donnell and Joseph, further reinforces the explicit testimony. Their conduct was in conformity with, and necessarily implied, the existence of such joint venture agreement so completely as to render incredible and manifestly any contrary interpretation.

(b) Joint Venturers Stand in Fiduciary Relationship to One Another and Are Required to Deal With One Another in the Highest Degree of Good Faith.

In Oregon and generally, where a joint venture exists, the venturers stand in a fiduciary relationship to one another and must exercise the highest degree of good faith. Thus, in *Walls v. Gribble* (1942), 168 Ore. 542, 124 P. 2d 713, one joint venturer was held to account to another where he concealed from the other important information concerning the deal, and got that other to terminate his interest, in ignorance of the important information.

The court quoted 30 Am. Jur., Section 34, with approval:

> "The relationship between joint adventurers, like that existing between partners, is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise. This is especially true of those to whom the conduct of the transaction, or the property involved therein, is entrusted. Such a party will be regarded as a trustee and will not be permitted to enjoy any unfair advantage because of his possession or control of the joint property. The mere fact that he is intrusted with the rights of his coadventurers imposes on him the duty of guarding their rights equally with his own, and he is required to account strictly to his coadventurers; and if he is recreant to this trust, any rights they may be denied are recoverable." (p. 714, Pac. Rep. citation.)

In the instant case also O'Donnell was entrusted with the handling of the negotiations; in the instant case also he concealed vitally important information concerning the quality and quantity of the timber (he admittedly never

communicated with Joseph after March 31, 1953, until the Kinzua deal was made [O'Donnell, Tr. 1931], and never told him about the favorable cruise taken in June-July, 1953, or concerning the temporary delay of Allyn & Company with its effect on financing [O'Donnell, Tr. 1931], or concerning the April and May, 1953, possibility of having Webster come in for part of the financing).

Here too, concealing from his joint venturer vital facts, and failing to act toward him with honor and rectitude, O'Donnell should be held to account as a constructive trustee.

Thus, in the case of *McIver v. Norman* (1949), 187 Ore. 516, 205 P. 2d 137, in reversing a decree of dismissal in a suit by plaintiff for an accounting of a joint venture, the appellate court laid heavy stress on the fiduciary relationship of joint adventurers, and the absolute good faith required of the trustee to whom the deal or property may be required. As the opinion says, and as is here the case also, ". . . if he is recreant to his trust, any rights they may be denied are recoverable." (p. 139, Pac. Rep. citation.)

The joint venture relationship, regardless of differences between the venturers—continued to exist for purposes of accounting.

The same principles are enunciated and followed in *Thimsen v. Reigard* (1920), 95 Ore. 45, 186 Pac. 559.

(c) Where There Is a Joint Venture Agreement, the Law Implies Equality of the Shares Unless There Is a Contrary Arrangement on This Score.

Elsewhere in this brief, it is made, we believe, abundantly clear that there was an express joint venture agreement proved for a precisely equal division of the purchase of Kinzua between plaintiff and O'Donnell.

However, it is in any case the law that even were this joint venture to rest on the conduct of O'Donnell and Joseph rather than the express agreement, still the proportion of the deal to go to each would be equal.

Thus, in *Campbell's Automatic Safety Gas Burner Co. v. Hammer* (1915), 78 Ore. 612, 153 Pac. 475, the court held that an agreement to sell stock as sole agents made each a participant in a joint venture, which as between them created a fiduciary relationship. Under such circumstances, the court held, there exists a presumption that each party had an equal share in the enterprise.

* * *

It is submitted that the substantive legal principles involved in this case are plain, and that if appellant's factual argument is accepted, his entitlement to relief is clear.

Conclusion.

In closing, we do not feel that an elaborate peroration is appropriate or required. We think that the evidence herein cited overwhelmingly establishes, largely from the admissions of the defendants and from documentary evidence, that the findings, conclusions of law and the judgment of the trial court, insofar as they purport to find against the formation and continuing existence of a joint venture between O'Donnell and Joseph for the purchase of Kinzua, on suitable terms, and the gross violation by O'Donnell of his fiduciary obligations, are clearly and manifestly erroneous.

As many as three sets of defendants, separately represented at trial, may write briefs totaling hundreds of pages in reply to the facts herein set out. Try as they

will, they cannot keep the facts presented in this record from speaking persuasively to this court of the transgressions of legal and equitable obligation engaged in by defendants; the truth shines out of this record despite all the efforts of certain of the defendant witnesses to obfuscate it.

The respondents' briefs will cover many matters, but must concern themselves with fringe questions, and cannot cope with or affect the basic pattern of defendant O'Donnell's duplicity and violation of plaintiff's rights. For this duplicity and these violations stand overwhelmingly proved by the reluctant admissions of defendants themselves, by the documentary evidence amassed before the trial court, and by the impossibilities and self-contradictions generated by defendants' stories.

The judgment of the trial court dismissing the action should be reversed, and the matter remanded to the district court for further proceedings not inconsistent with such reversal and with what appellant believes to be the plain admissions requiring a finding of equal joint venture between O'Donnell and Joseph to purchase Kinzua.

We respectfully submit that the judgment of the trial court requires reversal as being based upon findings which are clearly erroneous, and for the other reasons herein stated and urged.

PRITZKER, PRITZKER & CLINTON,
STANFORD CLINTON and
LAWRENCE WILLIAM STEINBERG,
Attorneys for Plaintiff and Appellant Harry Joseph.

APPENDIX A.

Alphabetical Identification of Persons Mentioned in the Record.

NOTE: The following list is not intended as entirely complete or as completely characterizing the persons referred to. It is simply intended to furnish for this court a handy reference identification of many of the leading persons referred to in the lengthy record.

ARTHUR C. ALLYN: Investment banker from Chicago, chairman of the board of A. C. Allyn & Co.; acquainted with plaintiff Harry Joseph for many years [Allyn, Tr. 2869-2870].

GERSON BERNSTEIN: a Detroit certified public accountant who represented Anderson Lumber Company and provided Terman some Kinzua information [Gold, Tr. 2912].

ISADORE CALLNER: Treasurer and buyer of the Joseph Lumber Company [Callner, Tr. 2109].

JOHN CASEY: An attorney representing the Kinzua Lumber Company sellers, and advising Joseph Coleman [O'Donnell, Tr. 1628].

DAVID S. CHESROW: Chicago attorney and real estate investor. Friend of Harry Joseph, who agreed to invest $250,000 in Kinzua [Chesrow, Tr. 1507-1508].

RALEIGH CHINN: An intimate friend of O'Donnell [Chinn, Tr. 786-787] and business intimate of Harry Joseph for many years [Chinn, Tr. 788-789]. First O'Donnell group member to get information from Joseph and Terman on Kinzua [Chinn, Tr. 802]; advised O'Donnell of possibility of Kinzua purchase [Chinn, Tr. 839]. A Kinzua investor and defendant.

CARL COLEMAN: A brother of Joseph Coleman and himself a selling agent for the Kinzua stock; visited by O'Donnell during the winter of 1952-1953 at Shadow Mountain, California [O'Donnell, Tr. 1819].

JOSEPH COLEMAN: President of the Kinzua Lumber Company; active in the sale of Kinzua [Joseph, Tr. 353].

BRYANT R. DUNN: Seattle attorney, represented O'Donnell's group in Kinzua deal, and a defendant and purchaser of Kinzua stock [Dunn, Tr. 1008].

IRA FIELDS: Chicago Certified Public Accountant; auditor for Joseph Lumber Company [Fields, Tr. 1183].

J. GEORGE GOLD: California attorney, represented a major indirect shareholder in Kinzua [Gold, Tr. 2884]; advised Terman that Kinzua stock was for sale [Gold, Tr. 2907].

SOL A. HOFFMAN: Chicago attorney and investor; friend of Joseph, agreed with him to invest $250,000 in Kinzua [Hoffman, Tr. 1100, 1107].

THOMAS H. HOLMES: A doctor and psychiatrist, treated Mrs. O'Donnell, and testified as a witness for defendants [Holmes, Tr. 1966-1971].

SAMUEL C. HORWITZ: Chicago attorney, business executive, Master in Chancery [Horwitz, Tr. 1479]; knows Joseph for 30 years, and a business associate [Horwitz, Tr. 1480-1481]. Agreed with Joseph to invest $250,000 in Kinzua [Horwitz, Tr. 1481].

HARRY JOSEPH: Plaintiff in this case. A substantial Chicago lumberman and businessman, President of the Joseph Lumber Company [Joseph, Tr. 314-319].

HUGH G. M. KELLEHER: A New York financial consultant, contacted by O'Donnell to interest Howard Webster in the Kinzua deal [Kelleher, Tr. 3028-3042]. Later he sought commission from O'Donnell [Kelleher, Tr. 3135, 3147, etc.].

IRVING KESTERSON: Manager of a lumber plant for the Wymans; visited the Kinzua properties with O'Donnell [Tr. 1758-1759].

William J. Lancaster: Chicago attorney, friend of Joseph; agreed with him to invest $50,000 in Kinzua [Lancaster, Tr. 4228-4231].

William J. Lindberg: United States District Court Judge from Seattle; friend of defendant Harry O'Donnell; travelled with O'Donnell to Los Angeles in November, 1952 [Lindberg, Tr. 1855-1858].

W. M. Marshall: Representative of A. C. Allyn Company; represented that firm in investigation into Kinzua deal [Marshall, Tr. 3346, 3349].

Mark F. Mathewson: Seattle attorney, represented Howard Webster in his purchase of fifty per cent of the Kinzua deal [Mathewson, Tr. 2002-2003].

Lawrence McClellan: An associate of O'Donnell's; got a heart attack and did not participate in the Kinzua purchase [O'Donnell, Tr. 1426].

Milton H. Morris: A Chicago investor and friend of Harry Joseph for thirty years [Morris, Tr. 4170]. Agreed with him to invest $250,000 in Kinzua [Morris, Tr. 4173].

Andrew Munger: President of the Seattle First National Bank; discussed Kinzua purchase with O'Donnell [O'Donnell, Tr. 1665, 1667-1668].

James J. Needleman: Beverly Hills attorney, partner of J. George Gold [Needleman, Tr. 2691] represented Gladys Anderson, an indirect but major Kinzua stockholder [Needleman, Tr. 2697-2698]. Disclosed existence of Kinzua deal to Terman [Needleman, Tr. 2713-2714].

Harry J. O'Donnell: Defendant in this suit; Seattle, Washington, lumberman and clubman [O'Donnell, Tr. 1405-1407].

MARGARET O'DONNELL: Wife of Harry O'Donnell [Holmes, Tr. 1967].

HARRIS PERLSTEIN: Chairman, Pabst Brewing Company, friend of Joseph for many years; agreed with him to invest $250,000 in Kinzua [Perlstein, Tr. 4198-4200].

HENRY RUSSELL PLATT: Banking and business executive; knew Joseph; agreed to invest $250,000 with him in Kinzua and offered to help secure further funds if needed [Platt, Tr. 4206-4207, 4213].

ABRAHAM PRITZKER: A Chicago attorney; a friend of Joseph; agreed with Joseph to invest $1,000,000 with Joseph in Kinzua [Joseph, Tr. 2346-2348].

ALVIN SCHWAGER: One of the O'Donnell group participating in the Kinzua purchase [O'Donnell, Tr. 1413-1414].

HENRY F. SHOEMAKER: Private banker from Seattle and Switzerland; business associate of Howard Webster [Shoemaker, Tr. 2050-2053].

DON SILVERTHORNE: Officer of the First National Bank of Portland; present at meeting to discuss Kinzua financing with O'Donnell [Tr. 1683].

ED STUCHELL: An O'Donnell associate; one of the O'Donnell group participating in the Kinzua purchase to the extent of about ten per cent [O'Donnell, Tr. 1426, 1429].

SAMUEL E. TERMAN: A real estate broker and investor in Los Angeles [Terman, Tr. 1145-1146]. Friend of Joseph [Tr. 1147]. First heard of Kinzua deal, and as a broker gave the information to Joseph [Terman, Tr. 1148, 1161].

HENRY THOMAS: A timber cruiser, employed by O'Donnell and his group, who started in June, 1953, did a check cruise of the Kinzua timber and provided a favorable report [O'Donnell, Tr. 1567, 1570].

CLAYTON WATKINS: Manager of the Metropolitan Branch of the Seattle First National Bank [Tr. 1657].

R. HOWARD WEBSTER: Managing director of Imperial Trust Company in Montreal [Webster, Tr. 2650-2651]. Bought 50 per cent of the Kinzua deal with O'Donnell [Webster, Tr. 2657].

D. E. WYMAN: Associate of O'Donnell; one of the O'Donnell group participating in the Kinzua purchase [O'Donnell, Tr. 1411-1412, 1417].

MAX H. WYMAN, JR.: Associate and one-time employee of O'Donnell; one of the O'Donnell group participating in the Kinzua purchase [O'Donnell, Tr. 1411-1412, 1417].

MAX WYMAN, SR.: An O'Donnell associate; contemplated investment in Kinzua but did not; instead his two sons did participate with the O'Donnell group [O'Donnell, Tr. 1412, 1422].

APPENDIX B.

LIST OF EXHIBITS.

Plaintiff's Exhibits in Evidence.

(NOTE: Exhibits admitted only as parts of admitted depositions are herein listed as having been offered and admitted at the points in the record where they were offered and marked for identification in the depositions.)

Number	Page of Record Where Identified*	Page of Record Where Offered in Evidence	Page of Record Where Admitted Into Evidence
2	PTO-A-1	1212	1212
3	PTO-A-1	1212	1212
4	PTO-A-1	328	328
5	PTO-A-1	329	330
6	PTO-A-1	1167	1168
7	PTO-A-1	1291	1292
8	PTO-A-1	1291	1292
9	PTO-A-1	1291	1292
10	PTO-A-1	1212	1212
11	PTO-A-1	333	334
12	PTO-A-1	332	332
13	PTO-A-2	1212	1212
14	PTO-A-2	2934	2934
15	PTO-A-2	2982	2982
16	PTO-A-2	1176	1176
17	PTO-A-2	1291	1292
18	PTO-A-2	1212	1212
19	PTO-A-2	2942	2942
20	PTO-A-2	355	355
22	PTO-A-2	2951	2951

*A majority of the exhibits were originally identified in the Pre-trial Order (herein abbreviated PTO) Schedules A, B and C, which schedules are individually paginated.

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
23	PTO-A-2	369	369
24	PTO-A-2	369	369
25	PTO-A-2	370	370
27	PTO-A-2	895	895
28	PTO-A-3	895	895
29	PTO-A-3	895	895
30	PTO-A-3	895	895
31	PTO-A-3	895	895
32	PTO-A-3	895	895
33	PTO-A-3	2956	2956
34	PTO-A-3	390	390
35	PTO-A-3	1352	1352
36	PTO-A-3	2960	2961
37	PTO-A-3	2963	2963
38	PTO-A-3	402	402
39	PTO-A-3	402	402
40	PTO-A-3	407	407
41	PTO-A-3	431	431
42	PTO-A-4	431	431
43	PTO-A-4	2983	2983
45	PTO-A-4	447	447
46	PTO-A-4	458	458
47	PTO-A-4	1212	1212
48	PTO-A-4	630	630
49	PTO-A-4	1291	1291
50	PTO-A-4	1212	1212
51	PTO-A-4	369	369
52	PTO-A-4	456	456
53	PTO-A-4	1212	1212
54	PTO-A-4	463	463
55	PTO-A-4	464	464
56	PTO-A-5	2510	2510

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
57	PTO-A-5	469	469
61	PTO-A-5	3045	3045
62	PTO-A-5	3063	3063
65	PTO-A-5	3072	3072
66	3099	3103	3103
68	3114	3115	3115
72	PTO-A-5	3130	3130
73	PTO-A-5	3130	3130
74	PTO-A-5	3131	3131
75	PTO-A-6	3132	3132
76	PTO-A-6	3136	3136
78	PTO-A-6	3136	3136
79	PTO-A-6	3142	3143
80	PTO-A-6	3143	3143
81	PTO-A-6	3147	3147
82	PTO-A-6	3148	3148
83	PTO-A-6	3149	3149
84	PTO-A-6	3151	3152
85	PTO-A-6	3153	3153
86	PTO-A-6	471	471
87	PTO-A-6	473	473
88	PTO-A-6	2025	2025
89	PTO-A-6	2025	2025
90	PTO-A-6	473	473
91	PTO-A-7	3157	3157
92	PTO-A-7	474	474
93	PTO-A-7	475	475
94	PTO-A-7	478	478**
95	PTO-A-7	642	642

**The transcript, in what appears to be an error, speaks of Exhibit 25 as being here admitted; but the context makes it clear that Exhibit 94 was intended instead.

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
96	PTO-A-7	1291	1292
97	PTO-A-7	638	638
98	PTO-A-7	2026	2026
99	PTO-A-7	2026	2026
100	PTO-A-7	3045	3045
101	PTO-A-7	3063	3063
102	PTO-A-7	1291	1292
103	PTO-A-7	3063	3063
104	PTO-A-7	3063	3063
105	PTO-A-7	3158	3158
106	PTO-A-8	3162	3162
107	PTO-A-8	3159	3160
108	PTO-A-8	3165	3165
109	PTO-A-8	3167	3167
110	PTO-A-8	3167	3168
113	PTO-A-8	1896	1896
114	PTO-A-8	2031	2031
117	PTO-A-8	654	654
118	PTO-A-8	1876	1876
119	PTO-A-9	1877	1877
120	PTO-A-9	1877	1877
121	344	344	345
122	458	458	459
123	776	776	777
124	969	971	971
125	1108	1110	1111
126	1121	1121	1578
127	1583	1584	1584
128	1591	1598	1598
129	1598	1598	1598
130	1741	1741	1742
301	PTO-C-1	1291	1292
302	PTO-C-1	1150	1151

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
303	PTO-C-1	1157	1157
304	PTO-C-1	1291	1292
305	PTO-C-1	1291	1292
306	PTO-C-1	1291	1292
307	PTO-C-1	1212	1212
308	PTO-C-1	1291	1292
309	PTO-C-1	1291	1292
310	PTO-C-1	1291	1292
311	PTO-C-1	1291	1292
312	PTO-C-1	1291	1292
313	PTO-C-1	1291	1292
314	PTO-C-1	1291	1292
315	PTO-C-1	1291	1292
316	PTO-C-1	1291	1292
317	PTO-C-1	1291	1292
318	PTO-C-1	1291	1292
319	PTO-C-1	1291	1292
320	PTO-C-1	1291	1292
321	PTO-C-2	1291	1292
322	PTO-C-2	1291	1292
323	PTO-C-2	1212	1212
324	PTO-C-2	1291	1292
325	PTO-C-2	1291	1292
326	PTO-C-2	1212	1212
327	PTO-C-2	1212	1212
328	PTO-C-2	1212	1212
329	PTO-C-2	1291	1292
330	PTO-C-2	1212	1212
331	PTO-C-2	1291	1292
332	PTO-C-2	1291	1292
333	PTO-C-2	1291	1292
334	PTO-C-2	1212	1212
335	PTO-C-2	1212	1212

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
336	PTO-C-2	1291	1292
337	PTO-C-2	1291	1292
338	PTO-C-2	1291	1292
339	PTO-C-2	1212	1212
340	PTO-C-2	1212	1212
341	PTO-C-2	1212	1212
342	PTO-C-3	1212	1212
343	PTO-C-3	359	360
344	PTO-C-3	1212	1212
345	PTO-C-3	1212	1212
346	PTO-C-3	367	368
347	PTO-C-3	367	368
348	PTO-C-3	367	368
349	PTO-C-3	1291	1292
350	PTO-C-3	1291	1292
351	PTO-C-3	1291	1292
352	PTO-C-3	1291	1292
353	PTO-C-3	1291	1292
354	PTO-C-3	1291	1292
355	PTO-C-3	1291	1292
356	PTO-C-3	1212	1212
357	PTO-C-3	1212	1212
358	PTO-C-3	1212	1212
359	PTO-C-3	1212	1212
360	PTO-C-3	1212	1212
361	PTO-C-3	1212	1212
362	PTO-C-4	1291	1292
363	PTO-C-4	1291	1292
364	PTO-C-4	1212	1212
365	PTO-C-4	1212	1212
366	PTO-C-4	1291	1292
367	PTO-C-4	1291	1292
368	PTO-C-4	1212	1212

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
369	PTO-C-4	1212	1212
370	PTO-C-4	1291	1292
371	PTO-C-4	1291	1292
372	PTO-C-4	1291	1292
373	PTO-C-4	1291	1292
374	PTO-C-4	1212	1212
375	PTO-C-4	1212	1212
376	PTO-C-4	1212	1212
377	PTO-C-4	1291	1292
378	PTO-C-4	1291	1292
379	PTO-C-4	1291	1292
380	PTO-C-4	619	619
381	PTO-C-5	2334	2334
382	PTO-C-5	410	410
383	PTO-C-5	1291	1292
384	PTO-C-5	2028	2028
385	PTO-C-5	2028	2028
386	PTO-C-5	437	438
387	PTO-C-5	437	438
387-A	1263	2028	2028
388	PTO-C-5	437	438
389	PTO-C-5	437	438
390	PTO-C-5	2028	2028
391	PTO-C-5	461	461
392	PTO-C-5	2029	2029
393	PTO-C-5	445	445
394	PTO-C-5	1212	1212
395	PTO-C-5	1212	1212
396	PTO-C-5	1212	1212
397	PTO-C-5	1212	1212
398	PTO-C-5	1291	1292
399	PTO-C-6	1291	1292
400	PTO-C-6	1291	1292

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
401	PTO-C-6	1212	1212
402	PTO-C-6	1212	1212
403	PTO-C-6	1212	1212
404	PTO-C-6	470	470
405	PTO-C-6	1212	1212
406	PTO-C-6	1212	1212
407	PTO-C-6	1291	1292
408	PTO-C-6	1212	1212
409	PTO-C-6	1212	1212
410	PTO-C-6	1212	1212
411	PTO-C-6	1212	1212
412	PTO-C-6	1212	1212
413	PTO-C-6	1291	1292
414	PTO-C-6	1212	1212
415	PTO-C-6	1291	1292
416	PTO-C-6	1212	1212
417	PTO-C-6	2296	2296
418	PTO-C-6	2265	2265
419	PTO-C-7	2545	2545
420	PTO-C-7	2553	2553
421	PTO-C-7	2553	2553
423	PTO-C-7	1212	1212
433-A	570	571	571
433-B	571	572	572
433-C	575	576	576
433-D	1760	1760	1761

Defendants' Exhibits in Evidence.

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
500	PTO-B-1	328	328
501	PTO-B-1	329	330
502	PTO-B-1	333	334
503	PTO-B-1	332	332
504	PTO-B-1	431	431
505	PTO-B-1	531	531
506	PTO-B-1	355	355
508	PTO-B-1	1176	1176
509	PTO-B-1	369	369
510	PTO-B-1	369	369
511	PTO-B-1	369	369
512	PTO-B-1	370	370
513	PTO-B-1	390	390
514	PTO-B-1	407	407
515	PTO-B-2	2453	2454
516	PTO-B-2	559	559
517	PTO-B-2	458	458
518	PTO-B-2	456	456
519	PTO-B-2	463	463
520	PTO-B-2	464	464
522	PTO-B-2	2510	2510
523	PTO-B-2	471	471
524	PTO-B-2	473	473
525	PTO-B-2	475	475
526	PTO-B-2	473	473
527	PTO-B-2	474	474
528	PTO-B-2	2025	2025
529	PTO-B-2	431	431
530	PTO-B-2	402	402
531	PTO-B-3	402	402
532	PTO-B-3	478	478

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
533	PTO-B-3	630	630
534	PTO-B-3	2026	2026
535	PTO-B-3	1212	1212
536	PTO-B-3	1212	1212
537	PTO-B-3	1212	1212
538	PTO-B-3	1291	1291
539	PTO-B-3	1291	1291
540	PTO-B-3	1167	1168
541	PTO-B-3	1291	1292
542	PTO-B-3	1212	1212
543	PTO-B-3	1212	1212
544	PTO-B-3	1212	1212
545	PTO-B-3	1291	1291
546	PTO-B-4	1212	1212
547	PTO-B-4	1212	1212
548	PTO-B-4	2025	2025
549	PTO-B-4	642	642
550	PTO-B-4	1291	1292
551	PTO-B-4	1291	1292
552	PTO-B-4	2026	2026
553	PTO-B-4	638	638
554	PTO-B-4	447	447
555	PTO-B-4	2934	2934
556	PTO-B-4	2942	2942
557	PTO-B-4	2951	2951
558	PTO-B-4	2956	2956
559	PTO-B-4	2960	2961
560	PTO-B-4	2963	2963
561	PTO-B-4	2982	2982
562	PTO-B-5	2983	2983
564	PTO-B-5	1882 (in part)	1882 (in part)

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
576	PTO-B-5	1352	1352
578	PTO-B-5	3045	3045
579	PTO-B-6	3063	3063
580	PTO-B-6	3072	3072
581	PTO-B-6	3115	3115
582	PTO-B-6	3130	3130
583	PTO-B-6	3130	3130
584	PTO-B-6	3131	3131
585	PTO-B-6	3132	3132
586	PTO-B-6	3151	3152
587	PTO-B-6	3045	3045
588	PTO-B-6	2031	2031
589	PTO-B-6	3063	3063
590	PTO-B-6	3063	3063
596	PTO-B-7	2031	2031
600	PTO-B-7	1584	1584
623	PTO-B-8	654	654
629	PTO-B-9	2034	2034
630	PTO-B-9	1979	1979
631	PTO-B-9	1979	1979
632	PTO-B-9	1979	1979
634	PTO-B-9	895	895
636	PTO-B-9	895	895
637	PTO-B-10	895	895
638	PTO-B-10	1944	1944
639	PTO-B-10	1944	1944
642	PTO-B-10	1944	1944
647	PTO-B-10	1944	1944
649	PTO-B-10	1979	1979
650	PTO-B-10	1896	1896
653	PTO-B-11	2001	2001
654	PTO-B-11	2001	2001

Number	Page of Record Where Identified	Page of Record Where Offered In Evidence	Page of Record Where Admitted Into Evidence
655	PTO-B-11	2033	2033
692	PTO-B-13	2031	2031
697	PTO-B-14	2034	2034
698	PTO-B-14	2034	2034
699	PTO-B-14	2034	2034
700	PTO-B-14	2034	2034
701	PTO-B-14	761	762
702	PTO-B-14	1280	1280
703	785	784	785